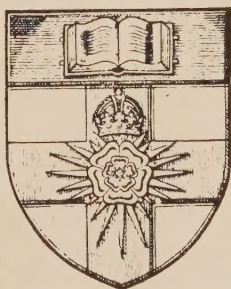


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IN IRELAND,

AND

THE IRISH LAND COMMISSION.

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### CORRIGENDA.

Page 48, line 8 from foot, *insert* "T. J. D. Atkinson" as counsel for the Bishop of Niagara.

„ 127, „ 14, and 133, line 18, *for* "executors" *read* "trustees".

„ 411, „ 5, *for* "Poole" *read* "E. S. Murphy".

„ 439, „ 15 from foot, *for* "At first I was entirely . . . step by step", *read as follows*: "At first I was entirely against Mr. Tobias, but I am convinced that he is right. He has gone back to the beginning, and traced the law step by step."

### NOTE.

The House of Lords have affirmed the judgments of the Court of Appeal in O'NEILL v. JOHNSTON, [1909] 1 I. R. 237 (see [1911] A. C. 552), and in THE IRISH SOCIETY v. FLEMING, [1911] 1 I. R. 353. The House held that no appeal was competent from the judgment in IN RE BLENNERHASSETT'S ESTATE, [1911] 1 I. R. 16.

### MEMORANDA.

On 13th August, 1911, THE RT. HON. SIR SAMUEL WALKER, BART., LORD CHANCELLOR OF IRELAND, died.

THE RT. HON. REDMOND J. BARRY, His Majesty's Attorney-General, was appointed Lord Chancellor.

CHARLES A. O'CONNOR, Esq., K.C., His Majesty's Solicitor-General, was appointed Attorney-General.

And IGNATIUS J. O'BRIEN, Esq., K.C., His Majesty's Second Serjeant-at-Law, was appointed Solicitor-General.



# C A S E S

DETERMINED BY

THE CHANCERY DIVISION

OF

THE HIGH COURT OF JUSTICE IN IRELAND,

AND BY

THE IRISH LAND COMMISSION,

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL.

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1911.

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WALKER *v.* McGOWAN.

M. R.  
1910.

*Labourers (Ireland) Act, 1886 (49 & 50 Vict. c. 59), s. 14—Power of contractor to enter upon lands and take stones—Right to blast in quarry.* June 2, 8.

The power conferred by section 14 of the Labourers (Ireland) Act, 1886, upon a contractor "to dig for, raise, and carry away in or out of any lands any stones" required for building labourers' cottages entitles him to resort to blasting operations, provided all reasonable precautions are used for the protection of the occupier of the land.

## INJUNCTION MOTION.

This action was brought for an injunction to restrain the defendant, his servants, and agents from blasting stones in the quarry on the lands of Ballinphull, in the County of Sligo, in the occupation of the plaintiff, and from raising stones thereon by blasting the rocks therein or otherwise in such manner as to cause a nuisance to the plaintiff.

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The plaintiff was the owner and occupier of part of the lands of Ballinphull, in the county of Sligo, on which there was a quarry with a supply of limestone therein. The quarry adjoined the public road, and its area was about 17 perches statute measure. It was at one end within about 70 yards and at the other end within about 130 yards distant from the plaintiff's dwelling-house. It was surrounded on three sides by fields, in which the plaintiff had cattle grazing.

On the 11th March, 1910, the defendant, who was a contractor to the Sligo Rural District Council for the erection of ten labourers' cottages, obtained an order at Petty Sessions (district of Grange) pursuant to section 14 of the Labourers (Ir.) Act, 1886, authorizing him and his assistants during the period of his said contract, that is until the 22nd day of August, 1910, to enter upon the plaintiff's lands at Ballinphull, and from the quarry there to dig, raise, and thence to carry away through all said lands a sufficient quantity of material required for the erection of the labourers' cottages.

This order was headed—"Bryan McGowan, complainant; Thomas Walker, defendant"; and was prefaced by recitals (pursuant to the statute) that Bryan McGowan, thereafter called "the contractor," entered into a contract with the Rural District Council of Sligo to carry out and execute all works necessary for the erection of the labourers' cottages, provided for by an improvement scheme made by the said Rural District Council, and situate in townlands within the said petty sessions district, and that it had been proved to the satisfaction of the justices that gravel, stones, and other material required for the building of the said cottages could not be conveniently procured elsewhere than in a certain quarry on part of the lands of Ballinphull, in the occupation of the defendant (who had received due notice of the application) in the petty sessions district and county aforesaid, the same not being a deer-park, bleach-green, orchard, walled-garden, haggard, demesne or yard, planted walk, lawn, or avenue to a mansion house.

The defendant entered on the plaintiff's lands, and proceeded on several occasions to blast the rocks in the quarry. The plaintiff alleged that the defendant had selected for such blasting the

part nearest to his dwelling-house, and had taken no precaution of any kind, either by covering the rocks to be blasted by furze or other bushes or materials, or by covering over in any way, or to any extent, or putting up any sort of hoarding at the edge of the quarry, at that place or otherwise, to protect life or property. He alleged that each time the blasting was carried on a number of stones were hurled over the fields where the cattle were grazing; and several fell within twelve yards of the dwelling-house, with the result that the safety of the persons using his dwelling-house and of his cattle was endangered. The plaintiff applied for an interim injunction to restrain the defendant, his servants, and agents, till the hearing of the action or further order, from blasting stones in the quarry on the plaintiff's lands, and from raising stones therefrom (by blasting the rocks therein or otherwise) in such manner as to cause a nuisance to the plaintiff. The motion came on for hearing on the 17th May, 1910, and the defendant undertook not to blast further until the motion was disposed of on the 2nd June.

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Affidavits were filed on behalf of the defendant denying that no precautions were taken, or that the plaintiff's house or cattle were endangered. The defendant alleged that due warning was given when blasting was about to take place. After the plaintiff's case was opened, the Master of the Rolls suggested that the motion should be treated as the trial of the action, and that it should be heard on a future day with an assessor, with liberty to each party to examine an expert, and this was agreed to.

The case came on again on the 8th June, before the Master of the Rolls, with Mr. Lopdell, C.E., as assessor, when Mr. Gilchrist, C.E., and Mr. Kirwan, C.E., were examined on behalf of the plaintiff and defendant, respectively. The effect of their evidence is sufficiently stated for the purpose of this report in the judgment of the Master of the Rolls.

*Jellett, K.C., and Leonard, for the plaintiff :—*

Section 14 of the Labourers (Ir.) Act, 1886, under which the defendant justifies his action, is against common right and must be strictly construed. The words are "dig for, raise, and carry away." Sub-section 3 provides that compensation is to be



*M. R.* made "for waste or injury committed by entering thereon, or  
 1910. by breaking the surface or making a passage through the lands."  
*WALKER* The right to blast cannot be included; blasting is not a necessary  
*v.* mode of getting stones from a quarry. The Grand Jury Act of  
*McGOWAN.* 1836 (6 & 7 Wm. 4, c. 116) had a similar section (162) using the  
 same words. There is no reported decision as to the meaning of  
 the words "dig for, raise, and carry away" in that section.  
 Section 5 (9) of the Land Law (Ir.) Act, 1881, gives the land-  
 lord the right to enter on his tenant's holding for the purpose of  
 quarrying or taking stone, but that would not authorize blasting.  
*Dolan v. Davis* (1) was a different case. It only decided that the  
 landlord could take stones from a quarry, whether already open or  
 not, and that payment of compensation was not a condition pre-  
 cedent to entry. The defendant is liable for any injury resulting  
 from his act, whether he was negligent or not: *Canadian Pacific*  
*Railway v. Parke* (2); *Rapier v. London Tramways Co.* (3).

Even if the statute authorized the defendant to blast, he was  
 bound to take reasonable precautions; and the evidence shows  
 that he did not take reasonable precautions.

*Fetherstonhaugh, K.C.*, and *Carson*, for the defendant.

The order of the magistrate authorized the defendant to get  
 stone from the quarry in the ordinary way, namely, by blasting.  
*Dolan v. Davis* (1) is in the defendant's favour; it is there laid  
 down that the landlord had the right to enter and take minerals,  
 stones, &c., by the known and customary methods and processes.  
 Blasting is the customary method of getting stones from a quarry.  
 The evidence shows that reasonable precautions were taken.

#### THE MASTER OF THE ROLLS:—

It seems strange that no decision is recorded as to the  
 meaning of section 162 of the Grand Jury Act of 1836 (6 & 7  
 Wm. 4, c. 116) so far as relates to the matter in question  
 in this case. One would expect that, having regard to the lapse  
 of time and the number of cases in which the section has been

(1) 32 L. R. Ir. 364.

(2) [1899] A. C. 535.

(3) [1893] 2 Ch. 588.

availed of by county surveyors and contractors, some judgment of a Superior Court would be forthcoming as an authority upon the meaning of the words "to dig for, raise, and carry away in or out of any lands . . . any gravel, stones, sand, or other materials which may be wanted for the building, re-building, enlarging, or repairing any bridge, arch, gullet, pipe, or wall, or for the making, repairing, or preserving any road or footpath."

Mr. Bolton in his valuable book on the Labourers Acts has pointed out that section 14 of the Labourers Act of 1886 is very similar to section 162 of the Grand Jury Act. Section 14 of the Labourers Act is as follows: "The sanitary authority or any person who has contracted with such authority for the carrying out or execution of the buildings or other works provided for in any improvement scheme, or any part thereof, shall have power and authority to dig for, raise, and carry away in and out of any lands, whether within or adjoining the sanitary district, any gravel, stones, sand, or other materials which may be required for any such buildings or works, subject to the following conditions, that is to say":—sub-section (1) excepts any lands being an orchard, &c.

Sub-sect. (2) provides for the case of an occupier refusing to give his consent to entry on his lands, in which event it is necessary to obtain an order from a justice of the peace. That happened in the present case. An order was obtained. There is no objection to the validity of the order or to the authority conferred by it. I have looked at the order which was made on March 11th, 1910, and I see no objection to it in point of form or substance. Sub-sect. (2) contains the following proviso, namely:—"Provided that a justice shall not grant such order unless after due notice to the occupier of such lands, nor unless he is satisfied that such gravel, stones, sand, or materials cannot be conveniently procured elsewhere." The authority given on March 11th, 1910, is one that is framed in view of the authorities under the Grand Jury Acts, and sets out on its face that it has been proved to the satisfaction of the justice that such gravel, stones, sand, or materials cannot be conveniently procured elsewhere than in the quarry of Mr. Walker; and it then negatives the possible contention that the quarry was within the

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exceptions mentioned in sub-sect. (1). I regard those provisions of the Act of Parliament, with reference to notice and satisfaction, as essential, and I look upon the unimpeached order of March 11th as a complete answer to the suggestion of any underhand work in this matter. I do not believe that this action has been commenced or defended from any motives of spleen or malice. The plaintiff was entitled to object to an entry on his lands for the purpose of taking stones enough to build ten labourers' cottages, a work which would involve a great deal of time, and cause inconvenience and a good deal of annoyance which the plaintiff could not get paid for.

But the provisions of sub-section (2) being to the effect stated, Mr. Jellett and Mr. Leonard say that sub-section (3) demonstrates that it was never in contemplation that the contractor should blast stones in the quarry. Sub-sect. (3) is as follows:—"The sanitary authority or such contractor shall make reasonable compensation to the occupier of said lands for the waste or injury committed by entering thereon, or by breaking the surface or making a passage through the lands; and to the owner and occupier, according to their respective interests therein, for the value of any gravel, stones, sand, or materials so taken. In case of disagreement the amount of such compensation shall be fixed by the county court judge for the division within which such lands are situate, whose order shall be enforceable in all respects as if the same were a civil bill decree." It is true that neither under the Grand Jury Act nor under this Act of 1886 (though compensation is awarded on a different scale) is the owner of the quarry as a rule compensated for the trouble and annoyance done to him; but it must be remembered that under both statutes the act authorized to be done is one for the benefit of the public, *e.g.*, building or repairing bridges, &c., under the Grand Jury Act, building of labourers' cottages under the Labourers Acts. Housing of the labourers is a public work—a public necessity.

In the absence of any reported decision, and acting on my own view of what the Legislature intended and expressed as its intention, I hold that, under section 14, the sanitary authority or any person who has contracted with it to carry out a scheme is justified (after complying with the statutory conditions) in

entering upon the lands of the occupier specified in the authority given by the justice, and obtaining stones by quarrying by blasting, and by blasting under the most improved conditions. If you want to build cottages, and to get contractors to work on reasonable terms, is it to be supposed that in carrying out the provisions of an Act passed in the year 1886 you are to resort to antiquated methods of raising stones, because the order under which the contractor acts is what Mr. Leonard calls a hostile order? I am aware of the difference between this provision of the Labourers Acts and the provisions of section 5 (9) of the Land Act, 1881. I am also, however, familiar with the case of *Dolan v. Davies* (1) and the judgment of Johnson, J., in that case. The learned Judge says at p. 392:—"The statute preserves to the landlord, and those authorized by him, the right to enter (without being trespassers), and take these substances by the known and customary methods and processes, making compensation for injury thereby to the tenant, viz., by quarrying or open working from the surface for limestone or other stones, or by sinking pits for gravel, sand, or clay, which are ordinarily obtained by those means. The right is not to enter and work an open quarry, but 'the right to enter' without being a trespasser, and by the process of 'quarrying' to take the limestone which is the landlord's property, but which otherwise he could not of right enter to possess himself of." The words "known and customary" do not mean legendary methods. They include modern methods, provided such methods are employed within reasonable and proper limits, and subject to reasonable and proper precautions. At least that is my view. Now in the present case the contractor has authority to blast, and the substitution of dynamite or gelignite cartridges for blasting powder was a modern, known, and customary, and therefore, according to my judgment, a proper, method of blasting for stones.

It is right to observe that, by a great expenditure of time and trouble, the limestone might be got in this quarry by a process known as wedging. Evidence was given on both sides as to this, and I have not overlooked the matter. But I am con-

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vinced that wedging is not a method suitable or convenient for working a quarry to get stones for labourers' houses, and in my opinion the Legislature could not have intended a contractor to work in that way. My assessor, Mr. Lopdell, is of that opinion; he says that in such cases as building bridges wedging would be useful, as you can get the stone away in large blocks; but if you were to get the stone for labourers' cottages by wedging, you would have to go over the process of wedging again and again. Could the Legislature have intended that? This wedging is out of the question. Dynamite and gelignite are reasonable explosives to use instead of blasting powder. But Mr. Jellett says that, even supposing that to be so, the defendant has no right conferred upon him by the Act or otherwise to injure a hair of the head of anyone living within the zone of danger, or to injure a beast grazing on the land which surrounds the quarry. I may state shortly that according to my judgment the contractor here is entitled to quarry as he has been doing, provided that he uses known and customary and reasonable precautions. Evidence was given that no one ever saw a hoarding or canopy to a quarry in the county of Sligo. I am not going to lay down that under no circumstances could a contractor justify blasting operations without erecting a hoarding or canopy. There may be cases in which a contractor would be bound to erect a hoarding or a cover or canopy. On the facts of this case I am advised by the assessor, and I myself consider that the result of the evidence is, that the advantage to be gained by erecting a hoarding above the quarry would be infinitesimal, having regard to the position of the quarry and to the depth from the surface of the land to the floor of the quarry, and to all the circumstances of the case. But there is a measure of precaution which the assessor advises me can be taken at a reasonable expense, and which under the particular circumstances ought, in his judgment, to have been taken, and must be taken during the remainder of the time allowed for the working of the quarry under the order. It is a process known as *weighting the shot*—a simple precaution; and it has a great advantage in the stoppage of stones and splinters, *i.e.*, in preventing stones and splinters from rising in the air and scattering at a distance from the edge of the quarry. The operation is easily carried out—the

drill hole is covered with branches of trees or furze bushes, weighted with stones, earth, or other heavy material placed over the mouth of the hole, or by protecting the mouth of the hole with temporary planking. This operation of weighting the shot is one which in my opinion, acting on the advice of my assessor, should be adopted by the contractor in this case before he puts in peril, if not the lives, at least, the well-being, of the cattle on the land or the inhabitants of the house. I think that the plaintiff has been guilty of exaggeration. I do not think that the number or weight of stones cast on the land was nearly so great as stated by him, but I cannot altogether disbelieve his evidence on affidavit merely because a person who went down last Saturday to the place did not see the stones which the plaintiff says were on the land. But even if there were only a dozen stones cast on the land, the contractor had no right to compel the plaintiff or his wife or servant to fly from the blast, and take shelter. In effect, a contractor acting under this Act of Parliament has the rights which I have described, but he is also subject to the obligation to do everything which is reasonably within his power to protect the lives and welfare of persons and cattle and property. The matter is a very important one. I have given it my best consideration with the assistance of my assessor. I have not overlooked the fact that some precautions were taken, *e.g.*, sending a person on to the land and requiring the cattle to be driven off the land, and warning the plaintiff that a blast was coming. I do not think that such precautions would protect the plaintiff from an aggravated trespass, for I call a rain of stones an aggravated trespass. I have said nothing in my judgment which conflicts with the propositions of law laid down in the case of *The Canadian Pacific Railway v. Parke* (1). The decision in that case turned upon the "sound construction" of one statute—my decision turns upon what I hold to be the "sound construction" of another statute.

I shall grant an injunction restraining the defendant from raising stones by blasting the rocks in the quarry without taking all reasonable and proper precautions to prevent injury to the

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adjoining lands, including in such precautions weighting of the shot by covering the drill-holes with branches of trees or bushes, weighted with stones, earth, or other heavy material, or by protecting the drill-holes with temporary planking in the way I have indicated. There will be no costs, as my judgment is partly against the plaintiff.

The following order was made:—

The Court doth order and adjudge that the defendant, his servants, or agents, be, and they are hereby, restrained from raising stone in the quarry on the lands of Ballinphull, in the county of Sligo, in the writ of summons mentioned, by blasting or otherwise, without taking all reasonable and proper precautions to prevent injury or accident, including in such precautions the “weighting of the shot,” that is to say, covering the drill-holes with branches of trees, bushes, or earth, or other heavy material, or protecting the drill-holes by temporary planking; and the Court doth make no order as to costs, and doth fix the assessor’s fee at the sum of £5 5s., to be paid moiety by the parties.

Solicitors for the plaintiff: *Fenton & Lyons.*

Solicitors for the defendant: *Fitzgerald & M’Cormick.*

W. L.



IN THE MATTER OF THE ESTATE OF ROBERT  
WILLIAM GOODWIN HILLAS.

Ross, J.  
1910.

Oct. 31.  
Nov. 8.

*Land Purchase Acts—Irish Land Acts, 1903 (3 Edw. 7, c. 37), s. 48;  
1904 (4 Edw. 7, c. 34), s. 3—Solvent estate—Insolvent as to part—  
Percentage payable to vendor—Mortgagor and mortgagee.*

An estate, declared to be a separate estate for the purposes of the Land Act, 1903, and sold to the tenants under the provisions of that Act, was solvent as a whole, but, in respect of one townland, was insolvent.

*Held*, having regard to the provisions of section 3 of the Land Act, 1904, that the vendor was entitled to retain for his own use and benefit the whole of the percentage or bonus payable under section 48 of the Land Act, 1903, to the exclusion of the mortgagee of the insolvent townland.

*In re Ely's Estate*, [1904] 1 I. R. 66, explained.

QUESTION arising on allocation as to whether the bonus payable under section 48 of the Irish Land Act, 1903, and arising in respect of a portion only of the estate, should be paid to the vendor of the estate or to the mortgagee of the aforesaid portion.

The estate for sale in this matter consisted, *inter alia*, of the lands of Rathurlisk. The said lands were held by the vendor in fee-simple. The estate as a whole was solvent. The lands of Rathurlisk were, in the year 1864, by the vendor's father, the then owner in fee-simple, mortgaged to secure the sum of £1362 17s. 6d. A sum of £1407 16s. 2d. was now due on the said mortgage. The certificate of the Irish Land Commission certified that the portion of the purchase-money applicable to Rathurlisk amounted to £1414. Prior charges amounted to £745 4s. 5d., leaving £668 15s. 7d., the amount coming to the mortgagees on foot of the aforesaid mortgage, being the net residue of the purchase-money of Rathurlisk. The percentage or bonus payable in respect of the whole estate amounted to £4016 5s. 7d., out of which a sum of £170 10s. 5d., being the apportioned part of the bonus in respect of Rathurlisk, was retained

*Ross, J.* in Court pending the settlement of the question as to whether  
 1910. the vendor or the mortgagees were entitled to the same.

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*G. A. McGusty*, for the mortgagees :—

The Land Act, 1903, s. 48 (1), provides that if the mortgagee is not paid in full the bonus must be added to the purchase-money (1). If the contention of the vendor is correct, there is nothing to prevent the owner of an insolvent estate who has another solvent estate lumping the two together, and so preventing the bonus from being added to the purchase-money. In *In re Ely's Estate* (2), it was decided that the bonus is part of the estate. If the bonus is a by-product, or part of the estate, it is clear that the mortgagor cannot take a part of the estate and leave his mortgagee unpaid. In *In re Power's Estate* (3), Wylie, J., held, following *Ely's Estate* (2), that the bonus is an interest in the settled land. It is clear that the mortgagor cannot retain any interest in the mortgaged estate without seeing his mortgagee paid. In *Annaly's Estate* (4), Kekewich, J., held the bonus to be an interest in the hereditaments; so also in *Tremayne v. Rashleigh* (5); *In re Shelton's Estate* (6); *Herrick v. Herrick* (7). A fine cannot be held by a lessor against his mortgagee: Coote on Mortgages, p. 810. In *Pile v. Pile* (8) the mortgagee captured a sum given in redemption of the business profits of the mortgaged

(1) The following sections of the Irish Land Acts are referred to in the argument and judgment :—Irish Land Act, 1903, sect. 48 (1) . . . .  
 “Provided that where an estate is so incumbered that the vendor is not entitled to receive for his own use any part of the rents or profits thereof . . . . the percentage shall be added to the purchase-money, and shall not be paid to the vendor.” Irish Land Act, 1904, sect. 3(1): “Where the vendor is a tenant for life or a person having the powers of a tenant for life under the Settled Land Acts, 1882 to 1890, the percentage shall . . . be retained by him as his own proper moneys for his own use and benefit, free and discharged from all claims upon the lands sold, or the purchase-money thereof, and from any trust affecting the same.”

(2) [1904] 1 I. R. 66.

(6) [1910] 1 I. R. 161.

(3) [1907] 1 I. R. 51.

(7) *Ibid.* 301.

(4) 53 W. R. 150.

(8) 3 Ch. D. 36.

(5) [1908] 1 Ch. 681.

premises. So also as to the good-will of a public-house: *Chissum v. Deves* (1). In *Leigh v. Burnett* (2) the mortgagor got an advantage not contemplated at the time the mortgage was executed. It was held to be captured by the mortgage. The bonus has been apportioned in respect of estates sold partly before, and partly after, the Act of 1909, a 12 per cent. bonus being given in respect to one portion and a 3 per cent. bonus in respect to the remainder. The 3rd section of the Act of 1904 only says that, as between the tenant for life and the remainderman, the tenant for life gets the bonus for his own use.

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*J. H. Pigot, K.C.*, for the vendor :—

The Commissioners have made a declaration in respect of the present estate that it is a separate estate, and it is in respect of this separate estate that the bonus has been paid. It would be impossible to examine the solvency of every small portion of an estate. Section 48 (1) says that the bonus shall be added to the purchase-money where the vendor is not entitled to receive "any part of the rents," not "the rents of any part." The bonus is payable on the entire estate, and is indivisible: *Minhear's Estate* (3). The *ratio decidendi* in *Power's Estate* (4) is the Act of 1904, which gave the bonus to the tenant for life. Since the Act of 1904, the tenant for life gets the bonus absolutely. The 3rd section of that Act has made the bonus something distinct from the lands. The Act of 1845 allows assignments of contingencies in land, but not a possible bonus arising on a possible Act of Parliament which might be passed. After the vesting order all claims attach to the purchase-money, not to the bonus: Land Act, 1903, section 16.

*McGusty*, in reply :—

In none of the cases was it argued that section 3 of the Act of 1904 swept away covenants to settle after-acquired property. The section was one merely between the tenant for life and the remainderman. Section 24 of the Act of 1903 contemplates the apportionment of the purchase-money as regards each of the holdings.

(1) 5 Russ. 29.

(2) 29 Ch. D. 231.

(3) 38 Ir. L. T. R. 215.

(4) [1907] 1 I. R. 51.

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In this case the vendor is the absolute owner of a large estate which, as a whole, is quite solvent. The vendor has received a large sum as a bonus under the Act of 1903. There is one portion of the estate that is subject to a mortgage, and the purchase-money is insufficient to satisfy the mortgage. The bonus arising in respect of this portion is a sum of £170. The question is, whether this sum is to be paid to the vendor or to the mortgagee.

In the first place, it has been contended on behalf of the vendor that the bonus is one and indivisible, and must be paid to the vendor. No doubt it must, in the first instance, be paid to the vendor; but a Court of Equity is not precluded from ascertaining the amount, and, if necessary, fastening a trust upon it in the vendor's hands. In this case it has been actually ascertained. If the portion of the estate in question had not been sold, the amount of the bonus payable to the vendor would have been £170 less.

The next question is whether there is any trust in favour of the mortgagee to be fastened upon this sum in the vendor's hands.

In *Ely's Estate* (1) I decided—and the decision has been accepted by all the Judges who have since had to consider the matter both in England and Ireland—that the bonus was distinct from the purchase-money; that it was a by-product of the sale; that equity would not allow the tenant for life to appropriate it to his own use, and that he was bound to hold it on trust for other parties interested in the estate as well as for himself. I wish to add that I have never decided or held that the bonus was an interest in the land.

If the law had remained unchanged, the vendor would have been obliged to hold it on trust for the mortgagee; but the law has been changed by the Act of 1904.

In *Carroll's Estate* (2) I pointed out that these statutes recognized that it was for the public good that a pecuniary consideration should be given to owners of estates to induce them to sell to their

(1) [1904] 1 I. R. 66.

(2) [1906] 1 I. R. 661.

tenants; that it was necessary in the case of solvent estates, where the owner is in receipt of an income, which would be lessened if he sold to his tenants; that it is still more necessary in the case of an insolvent estate, because if the owner is to get nothing out of the estate he would not take the trouble to sell at all.

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With this in view we turn to the 3rd section of the Act of 1904. The tenant for life, we find (and the absolute owner can be in no worse position), is empowered to retain the bonus as his own proper moneys for his own use and benefit, free and discharged from all claims upon the lands sold, or the purchase-money thereof, or from any trust affecting the same.

It is contended on behalf of the mortgagee that this section is merely intended to alter the law as laid down in *Ely's Estate* (1), which was a contest between tenant for life and remainderman.

The concluding words show that no such limited construction can be put upon the section. In this case, if the mortgagee had sold by virtue of his powers in that behalf, there would have been no bonus.

The bonus has been earned in a sense by the action of the vendor; and, under the express words of the section quoted, must be retained by him as his own property.

Solicitor for the mortgagees: *Harford Kelly*.

Solicitor for the vendor: *Maxwell & Weldon*.

D. M. S.



*Appeal.*  
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Nov. 1, 2.

IN THE MATTER OF THE ESTATE OF ARTHUR  
BLENNERHASSETT (1).

*Land Purchase Acts—Sale of incumbered lands—Mortgage—Arrears of interest—Statute of Limitations (3 & 4 Wm. 4, c. 27, s. 42).*

Where lands are sold under the provisions of the Irish Land Act, 1903, the owner of an incumbrance or charge upon such lands, portion of the arrears of interest due upon which has become statute-barred, is only entitled to be paid out of the purchase-money the arrears of interest which accrued during the six years prior to the payment of the purchase-money into the Bank of Ireland, and the order attaching claims thereto, under sect. 24, sub-s. 1, of the Irish Land Act, 1903, together with all further interest accrued since that date.

APPEAL from an order of Ross, J., made in this matter on the 6th day of July, 1910.

By an indenture, dated the 15th day of July, 1880, Arthur Blennerhassett, the above-named vendor, mortgaged the lands sold in the matter, together with other lands, to the appellants, the Scottish Widows Fund Life Assurance Society, to secure the repayment to the Society of the sum of £10,000, with interest thereon at 5½ per cent. The said lands having been sold by the vendor under the provisions of the Irish Land Act, 1903, the Society appeared before Ross, J., on the ruling of the final schedule of incumbrances affecting the lands (on which schedule they ranked ninth in the list of claimants), and contended that they were entitled to be paid out of the purchase-money of the lands the capital sum of £10,000 secured by the said mortgage, together with £8138 8s. 1d., representing fifteen years' arrears of interest on the said mortgage due to the Society. The learned Judge held that he was bound by the decision of Meredith, J., in *Howlin's Estate* (2), and declared accordingly that the claimants

(1) Before THE LORD CHANCELLOR and LORDS JUSTICES HOLMES and CHERRY.

(2) 40 I. L. T. R. 207.



were only entitled to be paid out of the purchase-money the arrears of interest which had accrued due during the six years prior to the payment of the purchase-money into the Bank of Ireland, and the order attaching claims thereto, together with all further interest accrued since that date. From this order the Society now appealed.

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*S. L. Brown, K.C., Garrett Walker, K.C., and R. J. Herbert Shaw, for the appellants:—*

We contend that the mortgagees are entitled to be paid the full arrears of interest on their mortgage. No doubt *Howlin's Estate* (1) is against our contention, but that case is not binding on this Court, and should not now be followed. Sect. 42 of 3 & 4 Wm. 4, c. 27, has no application; there was here no "distress, action, or suit" by the mortgagees to recover the arrears of interest. Sales under the Land Purchase Acts are originated by the vendors without consulting, and often against the will of, incumbrancers, who are thereby deprived of their right of lying by, in the hope of being repaid in full, or of themselves exercising their statutory power of sale, in which latter case, admittedly, they could retain for themselves the full arrears due out of the purchase-money. That such sales take place *in invitum* as regards incumbrancers is shown by sub-section 1 of section 16, and sub-sections 1, 6, and 7 of section 24 of the Act of 1903. The "claims," which by sub-section 1 of section 16 cease as against the lands, and attach to the purchase-money, must be, not merely ascertained rights, but all existing rights which are merely transferred from the lands to the money, and there is no provision in the Act to deprive a mortgagee of his right to be paid the full arrears of interest due on his mortgage, or to put a vendor who sells under the Act in a better position as regards such arrears than one selling outside the provisions of the Act. It is submitted that this is a proceeding, originated solely by the mortgagor, which is in the nature of a redemption suit, and that according to the rule in redemption suits the full arrears of interest should be paid. In *In re Owen Lewis's Estate* (2) the incumbrancer,

(1) 40 I. L. T. R. 207.

(2) [1903] 1 I. R. 348.

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who was disallowed more than six years' interest, availed himself of the proceedings in an incumbrancer's petition matter; it was because the mortgagee was in the same position as the petitioner who had invoked the aid of the Court that he was held disentitled to more. Here the mortgagees have done nothing. *Nixon's Estate* (1), *Bateson's Estate* (2), and *Smithwick's Estate* (3) leave this question an open one. The present case is ruled by *Lloyd v. Lloyd* (4). There the judgment of Stirling, L.J., who delivered the judgment of the Court in favour of the mortgagees, was based on the fact that the latter were not proceeding to recover arrears of interest by "distress, action, or suit." *Edmunds v. Waugh* (5) shows that a petition of trustees of a mortgagee's estate for payment out of Court of the proceeds of sale of mortgaged premises sold under the power of sale in a mortgage, and paid into Court in a suit for the administration of the mortgagee's estate, was not a "suit" to recover arrears of interest within the 42nd section of 3 & 4 Wm. 4, c. 27: *In re Marshfield* (6); *In re Stead's Mortgaged Estate* (7); *In re Slater's Trusts* (8).

*Ronan, K.C., H. D. Conner, K.C., and Macrory*, for the respondent:—

Not only was the decision appealed against right in principle, but to reverse it would upset the established practice which has been uniformly followed in the Incumbered Estates Court, the Land Judge's Court, and in the Court of the Irish Land Commission.

The cases relied on by the appellants' counsel, where more than six years' interest were allowed to a mortgagee, depend either upon the principle adopted in redemption suits, where the Court will only lend its assistance to the mortgagor upon such terms as it thinks just, including the payment of all arrears of interest, or upon the right of retention of a mortgagee, where the purchase-money of the mortgaged lands is either actually or constructively in his hands.

(1) I. R. 9 Eq. 7.

(2) [1896] 2 I. R. 171.

(3) *Ibid.* 401.

(4) [1903] 1 Ch. 385.

(5) L. R. 1 Eq. 418.

(6) 34 Ch. D. 721

(7) 2 Ch. D. 713.

(8) 11 Ch. D. 227.

The decision in *In re Lloyd* (1) was thus explained by Farwell, L.J., in *Hazeldine's Trusts* (2):—"In *In re Lloyd* there was a subsisting mortgage, and the only question was how much interest on that mortgage should be charged against the mortgagor as a term of allowing him to redeem. . . . Where there is a mortgage or charge which the mortgagor desires to redeem, the Court gives him its assistance by interfering with the legal right of the creditor only on such terms as are equitable; such terms are the price of its interference." Neither that principle, nor the principle which allows a mortgagee to retain the full amount of his debt out of moneys in his hands, has any application to sales in the Land Judge's Court or under the Land Purchase Acts. The object of the latter Acts, namely, to place occupying tenants in possession as owners of their lands, free from incumbrances, would be defeated, if, on their taking advantage of the Acts, vendors could be compelled to pay arrears of interest that had become statute-barred. It is clear that the person who originates the proceedings, and whom, under section 17 of the Irish Land Act, 1903, the Land Commission may deal with as owner, may or may not be the real owner out of whose pocket the arrears of interest are to come; it is otherwise in a redemption suit, and as to the purchase-money the incumbrancer never has or could have it in his possession, constructively or otherwise. Such a proceeding as this, if one *inter partes* at any stage, ceases to be so once the vesting order or fiat is made: see judgment of Walker, L.J., in *Bateson's Estate* (3). The purchase-money is entrusted to a judicial tribunal for distribution amongst the parties entitled, and each claimant has to come forward and establish his claim. That is a proceeding in Court which comes within the words of the 42nd section of 3 & 4 Wm. 4, c. 27. The claims which are transferred under the Act from the lands to the purchase-money must be claims which could be legally enforced. If the appellants' contention be correct, not only could arrears of interest, but also a capital sum charged on the lands, which had become statute-barred, be recoverable out of the purchase-money. This case is ruled by

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(1) [1903] 1 Ch. 385.

(2) [1908] 1 Ch. 34.

(3) [1896] 2 I. R. 171, at p. 180.

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*Howlin's Estate* (1) and *In re Owen Lewis's Estate* (2). In *Archdall v. Anderson* (3), which was a suit by an equitable mortgagee to raise the amount due on his mortgage, lands were sold under the judgment in the action, and realized more than was sufficient to pay the plaintiff's demand and costs; it was there held that claims brought in by legatees on foot of legacies charged on the lands sold were proceedings in the nature of a suit within section 42, and that the legatees were only entitled to interest on the legacies for six years prior to the action: *Hughes v. Williams* (4); *Henry v. Smith* (5); *Hughes v. Kelly* (6).

*Brown, K.C.*, in reply.

#### THE LORD CHANCELLOR:—

This case raises an important question, viz., whether the 42nd section of the 3 & 4 Wm. 4, c. 27, limiting the amount of arrears of interest which can be recovered by distress, action, or suit, is applicable to sales of land originated by the owner under the Land Act of 1903, after the purchase-money has been paid into Court under the provisions of the 24th section of that Act, and mortgagees or other incumbrancers make claims against that fund and are paid out of it. The facts are that Arthur Blennerhassett, the owner, applied to the Land Commission to have his lands sold to tenants. The Land Commission sold, and vested the lands in the purchasers, including the demesne resold to the owner, and then paid the purchase-money into the Bank of Ireland, and made an order attaching claims to that purchase-money. Claims were advertised for, and the appellants, who had a mortgage on the lands for £10,000 principal, made a claim for payment out of that fund of their principal and fifteen years' interest at the penal rate of £5 10s. per cent. per annum.

Mr. Justice Ross decided that only six years' arrears were payable, and the Company has appealed.

Mr. Justice Ross followed a decision of the Master of the Rolls, when Judicial Commissioner, in *Howlin's Estate* (1), in which the

(1) 40 I. L. T. R. 207.

(2) [1903] 1 I. R. 348.

(3) 25 L. R. I. 433.

(4) 3 M'N. & G. 683.

(5) 2 Dr. & W. 381.

(6) 3 Dr. & W. 482.



Master of the Rolls went exhaustively into the whole matter, and made an order which has since been followed by the Courts of first instance in distributing funds.

It is, indeed, admitted that to yield to the appellants' contention would alter the practice which has always been adopted in the Landed Estates Court, even when the owner is petitioner, and under inquiries in the Court of Chancery when the claims of incumbrancers are being adjudicated upon.

The words of the 42nd section are—"No arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action, or suit, but within six years next after the same respectively shall have become due," or next after the acknowledgment mentioned.

Notwithstanding the 42nd section, there are cases well established by decision in which the mortgagee is entitled to get the entire interest on his charge—one is where the suit is actually or constructively a redemption suit; another where actually or constructively the whole money is in his hands, as where he sells under a power of sale; all the latter cases are founded on the right of retention, which is not taken away from the mortgagee.

The cases which establish those exceptions are mainly *Edmunds v. Waugh* (1); *Re Marshfield* (2); *Lloyd v. Lloyd* (3). If there are any others, they are founded upon the principles of those three.

In *Edmunds v. Waugh* (1) there was a suit pending to administer the estate of a mortgagee, and while this was pending his trustees and executors sold the mortgaged premises under their power of sale, and the purchase-money was paid into the pending suit. The trustees made an application to have a transfer to the general credit of a sum of £250 representing in part a surplus over six years. The application was opposed by the assignee in insolvency of the mortgagor, and his counsel contended that the mortgagee's

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(1) L. R. 1 Eq. 418.

(2) 34 Ch. D. 721.

(3) [1903] 1 Ch. 385.

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application was in effect a suit to recover the arrears. Vice-Chancellor Kindersley, dissenting from the decision in *Mason v. Broadbent* (1), held that it was not; and the ground of his judgment at p. 420 is—"That fund is in the hands of the Court, not as belonging to the mortgagor, but it still is constructively as between the mortgagor and mortgagee in the hands of the mortgagee; and the present petition seeks to have this money dealt with according to the rights of the parties, and the mortgagor's assignee was served in order that he might make any claim he thought fit. It appears to me that the highest ground that the assignees can take is to ask to be regarded as coming to recover the surplus money, and insisting upon only six years' interest being retained by the mortgagee." In the case of *Re Marshfield* (2) the facts were stronger towards supporting the right of retention, because the suit was for the administration of a second mortgagee's estate, and a first mortgagee sold under his power of sale and received the whole proceeds. A person interested under the second mortgagee brought a summons to have determined the question whether the first mortgagee could retain more than six years, and the first mortgagee, though not a party to the suit, consented to appear and have the question argued. Kay, J., followed *Edmunds v. Waugh* (3), and he says:—"This summons, if it can be treated as a suit at all, is not a suit by a mortgagee to recover his interest, but a suit against the mortgagee by a person standing in the same position as the mortgagor to recover the surplus of the proceeds of sale . . . . I must hold that the first mortgagees have the right to retain more than six years' arrears of interest."

In the interval between those two cases there had been decided by Vice-Chancellor Malins a case of *Stead's Mortgaged Estate* (4), the facts of which are somewhat peculiar. There was an equitable mortgage on certain lands near Leeds. The Corporation of Leeds wanted the premises for municipal purposes, and they served notice to treat on a Mrs. Milner, who represented the mortgagor's interest, and, she not being able to make title, and the corporation

(1) 33 Beav. 296.

(2) 34 Ch. D. 721.

(3) L. R. 1 Eq. 418.

(4) 2 Ch. D. 713.



wanting possession, they paid the money into Court under the Lands Clauses Acts. The mortgagees petitioned to be paid out the whole money, including interest from the date of the advance. The Vice-Chancellor decided they could only get six years. He said the petition was analogous to a suit, and added, "I think the case is not affected by *Edmunds v. Waugh* (1), which went upon the principle of the right of retainer, and that this petition must be treated by analogy as a suit to recover principal and interest." *Lloyd v. Lloyd* (2) was strongly relied on by the appellants. [His Lordship stated the facts of that case, and continued.] It will be seen that this case proceeds on the principle of its being a redemption suit. Mr. Brown relied upon the passage in the judgment at p. 404, referring to *In re Stead's Mortgaged Estate* (3), "It was held by Malins, V.-C., that the petition was analogous to a suit for recovery of the land, and, therefore, that the principal and six years' interest could alone be recovered. Whether this decision be well founded or not, it does not govern the present case, inasmuch as the mortgagor, and not the mortgagee, is here applying to the Court for payment."

That is a well-founded distinction, and one sufficient for the purposes of the case; but it does not interfere with the decision of Malins, V.-C., or affect the general rule.

It is now material to see the way the fund comes into Court. The proceedings may be started under section 17 of the Act by a person who has really no title at all. [His Lordship read section 17 and section 24, sub-sections 1-6 and 7, of the Irish Land Act, 1903, and continued.] The vendor is then out of the case. It is not a proceeding *inter partes*, but one relating to the distribution of a fund by a different person among ascertained claimants. When that money is paid into Court, there is taken away from the mortgagee the right of going into possession, and the right of selling under a power of sale. He must by sub-section 7 assert his claim against the purchase-money representing the lands by a claim. There is no redemption and no retention. The purchase-money is distributed just as the Landed Estates Court distributes the purchase-money of an estate, and it

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is admitted that a party claiming under a mortgage on a schedule only gets six years' arrears of interest. The cases in this country are all in the respondent's favour, and the practice for all time is in his favour.

The only exceptions are redemption suits and rights of retention, actual or constructive.

I, am of opinion that the present case does not fall within those exceptions, and consequently that the decision of Mr. Justice Ross, following a long line of cases and the established practice in Ireland, was right.

The appeal must be dismissed with costs.

HOLMES, L.J. :—

The appellants are the Scottish Widows' Fund Life Assurance Society, which, in the year 1880, lent to Arthur Blennerhassett, on the security of a mortgage of certain lands, the sum of £10,000 to bear interest at the rate of  $5\frac{1}{2}$ , reducible to  $4\frac{1}{2}$  per cent. per annum. There was at that time, and has been since, a prior mortgagee who had vested in him the legal estate in the premises, and, therefore, the mortgage of 1880 was a charge only on the equity of redemption. Recently a considerable portion of these lands has been sold under the provisions of the Irish Land Purchase Acts. The greater part of what was so sold was in the occupation of tenants who entered into agreements with the landlord to purchase with money to be advanced by the Irish Land Commission; and the remainder, which was in the occupation of Mr. Blennerhassett himself, was bought by the Commission pursuant to the provisions of the aforesaid statutes. All the steps thereby prescribed have been duly taken up to and including the orders vesting the lands in the purchasers and the payment of the purchase-money into the Bank of Ireland, the result of which is to discharge the lands sold from incumbrances and charges, and to transfer all claims in respect thereof to the purchase-money, which is to be distributed by the Land Commission amongst the persons entitled thereto.

The order appealed from was made by Mr. Justice Ross in the exercise of this jurisdiction; and the matter in controversy is,

whether the appellants are entitled to be paid out of the purchase-money the full amount of interest unpaid on their mortgage debt at the date of its payment into the Bank of Ireland, or only to so much interest as accrued during the six years prior thereto.

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Ross, J., following a judgment binding on him, and without expressing any opinion of his own, decided that the right of the appellants was limited to interest for the six years aforesaid; and the matter in controversy depends upon the effect to be given to 3 & 4 Wm. 4, c. 27, section 42, which, in so far as it bears on this appeal, enacts that no arrears of interest in respect of any sum of money charged upon or payable out of land shall be recovered by any action or suit, but within six years next after the same shall have become due.

The contention of the appellants is that this provision does not extinguish the debt due for interest that accrued prior to the six years, but only prevents its recovery by action or suit; and that, as the appellants have been entirely quiescent, have taken no part in converting the land into money, and brought no action or suit, the section does not apply to them. It is, I think, not denied that there are cases in which a mortgagee can receive out of the mortgaged lands more than six years' interest. He can take possession, for example, and pay himself, out of the rents and profits, the principal debt and unpaid interest, even if such interest has been accruing for more than six years. So, too, he may sell under a power of sale and retain out of the purchase-money all the interest due; nor can the mortgagor redeem the lands except upon the terms of paying the interest in full. Cases of this kind, however, have always been rare in Ireland. From the year 1858, when the Landed Estates Court Act was passed, nearly all the land brought into the market for public sale has been sold under that statute.

Proceedings are begun in that Court by a petition for sale; and the petitioner may be the owner or an incumbrancer. He is generally a puisne incumbrancer, and the first mortgagee having the legal estate has no power to prevent the sale, if in the opinion of the Judge an adequate price is offered. When the sale takes place, the purchase-money is paid into the Court, by which it is distributed amongst all persons interested. During the half

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century in which this Act has been in operation, no instance can be found in which a mortgagee has been paid interest for a longer period than for six years before the date at which interest ceased to be payable; and yet the instances in which a larger amount was due are numberless. For nine years previous to the year 1858, there had been successive statutes passed for the sale of Irish incumbered estates in a Court appointed for the purpose; and in distributing the purchase-money of the lands sold, that Court acted upon the same rule as to interest on mortgage debts which was adopted in the Landed Estates Court. We can go farther back still. When the Act 3 & 4 Wm. 4, c. 27, was passed, and for long before, when a puisne mortgagee desired to recover his mortgage debt by a suit in Chancery, the relief given him was not foreclosure, but a decree for the sale of the mortgaged lands. The purchase-money paid into Court enured for the benefit of everyone interested therein; and, as far as we can ascertain, since the Act of Wm. 4, no mortgagee was paid thereout more than six years' arrears of interest on his mortgage debt. Were the Courts to which I have referred acting on any principles in thus dealing with these arrears in distributing the purchase-money over which they had control? I am of opinion that their action was founded on the principle that, the duty having been imposed on them to ascertain the rights of the several parties interested in a fund, they had regard only to rights that could be legally enforced, and that as mortgagees could not recover by suit, action, or any other process in a Court of law, more than six years' arrears of interest, their right ought to be similarly limited when applying for payment out of a fund under the control of such a Court.

Now, if the practice of the Landed Estates Court be in accordance with law—and I am not prepared to say that it ought to be altered after it has been followed for fifty years, especially as I am of opinion that it rests on a sound and intelligible principle—it is impossible to hold that the Land Commission can depart from the same rule in distributing the purchase-money of lands sold under the Land Purchase Acts. The agreement to sell, the carrying of it out, the vesting of the land in the purchaser, and the payment of the purchase-money into the Bank of Ireland, are



matters in which mortgagees of the lands cannot interfere in any way. Section 14 of the Act of 1887 and sections 16, 17, and 24 of the Act of 1903 show how completely the lands sold are relieved from all incumbrances and charges previously affecting them, which must be met out of the purchase-money to be distributed by the Land Commission as a Court in accordance with legal rights. The appellants in this case claim a sum for arrears which they could not, before the completion of the sale, have recovered, and which they cannot now recover by any suit or action. I am of opinion that this circumstance is an answer to their demand.

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CHERRY, L.J. :—

It is admitted that the facts in this case are indistinguishable from those in *Howlin's Estate* (1), and, therefore, the net question of law which we have to decide is, whether the present Master of the Rolls (then Meredith, J.) was right in deciding, as he did in *Howlin's Estate* (1), that when lands are sold under the provisions of the Land Purchase Acts, mortgagees are not entitled to be paid out of the proceeds of the sale more than six years' arrears of interest. The Scottish Widows' Fund Life Assurance Society, who are mortgagees upon the estate which has been sold in this matter, claim that they should be allowed fifteen years' arrears of interest. Their counsel contend that the case is not within the provisions of the 42nd section of 3 & 4 Wm. 4, c. 27, inasmuch as they are not seeking to recover the interest "by any distress, action, or suit." They say that where an owner voluntarily sells his estate to his tenants under the Land Purchase Acts, there is no statute of limitations applying to the interest due on mortgages or charges, but that an unlimited amount may be recovered if unpaid. This is a startling proposition, but, of course if it is well founded in law, the mortgagees in the present case are entitled to the benefit of it.

The series of Acts forming the Irish Land Purchase Code has very much curtailed the rights of mortgagees and incumbrancers. When public funds were first advanced to enable landlords to sell

(1) 40 I. L. T. R. 207.



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their estates to their tenants, the rights of mortgagees were not in any way interfered with; the property was conveyed by an ordinary conveyance, and a mortgagee, in whom the legal estate was vested, was a necessary party to the conveyance. He could withhold his assent to the sale unless his terms were complied with, and the only remedy of the mortgagor was a redemption suit in which he was, under the authorities, bound to pay the full amount of interest due, even though portion was barred by the Statute of Limitations. This was the system in force under the Acts of 1870 and 1881. The Land Purchase Act of 1885 (48 & 49 Vict. c. 73) first enabled an incumbered owner to sell to his tenants without the consent of his mortgagees. It did so by introducing the system of sales by vesting orders, which were given the effect of a Landed Estates Court conveyance (sect. 8), "the rights and claims of all persons in respect of the estate sold, or any incumbrance or annual charge thereon," being transferred to the purchase-money (sect. 9 (5)). The Act of 1887 extended this system of transferring claims of mortgagees from the land to the purchase-money to sales by conveyance also. This was done by the simple expedient of paying the purchase-money into the Bank of Ireland, and making an order transferring the charges to the purchase-money, as in the case of sales by vesting order (sect. 14). All sales are now made by vesting order or "flat" of the agreement, which has the same effect (Land Act, 1896, section 32), and mortgagees are in all cases barred from any remedy against the lands sold.

The Land Act of 1903 went a step further, for it not only enabled an incumbered owner to sell his estate to his tenants without the consent of his mortgagees, but it made it mandatory upon the Land Commission to sanction the sale and advance the purchase-money to the tenants, if the latter were judicial tenants, and the rate of purchase-money was within certain fixed limits, popularly known as the "zones." This is so, even though the incumbrances may exhaust the entire value of the property, and the nominal owner have really no interest therein, provided he has been for six years in receipt of the rents and profits (section 17). No notice is given to the mortgagees; they have no power of stopping the sale, and no control over the amount of the purchase-money, provided the prices of the holdings are within the zones,

or, if not coming within the zone provisions, provided they are "equitable" in the opinion of the Estates Commissioners (sections 1 and 5). The Estates Commissioners, although they negotiate the sale, and vest the holdings in the tenants in fee-simple, have nothing to do with the distribution of the purchase-money. It is their duty, in all cases, only to pay it into the Bank of Ireland, exactly as was done under the earlier Acts (section 16 and 24 (1)), and the funds in Court are then distributed by the Judicial Commissioner "to the persons entitled thereto, whose claims upon that money have been ascertained" (section 24 (6)). The distribution of the purchase-money is carried out in the same manner as in the Land Judge's department of the Chancery Division of the High Court. The Act of 1903 still further reduces a mortgagee's rights by providing that "any charge or incumbrance may be paid off, notwithstanding any direction, proviso, or covenant to the contrary contained in any instrument" (section 24 (6)).

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The Land Purchase Acts have thus deprived mortgagees of all rights except the right to be paid whatever sums may be legally due to them for principal and interest. There is no trace in any of the Acts of any intention to compensate them for the loss of other rights, or to confer upon them any additional privileges in lieu thereof.

If we consider the matter on principle, apart altogether from authority, we must, I think, come to the conclusion that a mortgagee has no legal claim to more than six years' arrears of interest. The duty of the Court is, as I have said, to pay the purchase-money to the persons entitled thereto. How can a man be said to be entitled to money when he has been deprived of all means of recovering it? The mortgagee cannot keep the land: it is sold and vested in a purchaser in spite of him. He cannot pay himself out of the purchase-money, for the money never comes to his hand. He cannot bring any action or suit to recover it, for if he does he is met at once by the Statute of Limitations (3 & 4 Wm. 4, c. 27, section 42). What right of any kind has he in it? A "claim" must surely mean a legal claim, not a mere debt of honour, if a statute-barred debt be such.

But how do the authorities stand? They are very numerous,

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and in Ireland all uniformly against the appellants' contention here. The main argument of Mr. Brown, that his clients are not within the express words of section 42 of 3 & 4 Wm. 4, c. 27, because they have not brought any "distress, action, or suit," is very wide in its application. It would cover every case where a party, other than a plaintiff or petitioner, applies to the Court for payment out of the proceeds of sale of mortgaged land. But in every Irish authority which has been cited to us, whether in the Court of Chancery prior to the Incumbered Estates Act, in the Landed Estates Court, or in the Land Commission, it has been held that only six years' arrears of interest were payable. The earliest case is *Hughes v. Kelly* (1). There lands had been conveyed to the defendant, subject to certain charges in favour of his sisters which he covenanted to pay. He mortgaged the lands to the plaintiff, who filed a bill to raise the amount due on the mortgage, and it was held by Sir Ed. Sugden, L.C., that in that suit the claim of the chargeants, who were not parties to the suit, was barred by the 42nd section of 3 & 4 Wm. 4, c. 27. *Nixon's Estate* (2) was a case of an owner's petition in the Landed Estates Court. The question of the amount of interest payable on a legacy charged on the lands was, among other questions, raised in the Court of Chancery Appeal, and referred to Flanagan, J., for determination. Although it does not appear in the report, we are informed that he allowed only six years' arrears.

In *Archdall v. Anderson* (3), legatees whose legacies were charged upon certain lands sold in an action in the Chancery Division to raise the amount due on an equitable mortgage, were held by Chatterton, V.-C., entitled only to six years' arrears of interest, although a much larger sum was unpaid. A similar ruling was made by Bewley, J., in *Smithwick's Estate* (4), and by Ross, J., in *Owen Lewis's Estate* (5), and by Meredith, M.R., in *Howlin's Estate* (6). There is no doubt that the appellants'

(1) 3 D. & War. 482; 5 Ir. Eq. R.  
286; 61 R. R. 109.

(2) 1 I. R. 9 Eq. 7.

(3) 25 L. R. Ir. 433.

(4) [1896] 2 I. R. 401.

(5) [1903] 1 I. R. 348.

(6) 40 I. L. T. R. 207.

argument here, founded upon a strictly literal reading of the words of the 42nd section of 3 & 4 Wm. 4., c. 27, would have been applied equally to all these cases; and if we are to yield to it, we must not only reverse the practice which has prevailed in Ireland for over sixty years in all the Courts, but we must also overrule the decisions of six eminent Judges (including the highest authority on real-property law, Lord St. Leonards), which decisions were not only acquiesced in by the parties to them, but also by hundreds of other claimants upon incumbered estates sold under the various statutory powers in Ireland.

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It is said, however, that we are coerced by recent English authorities to take that course. A number of cases were relied upon by Mr. Brown and Mr. Walker for the appellants here, in which more than six years' arrears of interest were allowed. But they were all either cases in which the mortgagee had sold under a power of sale, and was held merely to be entitled to *retain* out of the purchase-money the full amount of the interest due (the money in Court being treated as still constructively in his possession), or cases where the mortgagor was seeking to redeem the mortgage, and the Court acted upon the principle that the legal right of the mortgagee should only be interfered with on such terms as were equitable, these being interpreted to be the payment of all interest due, whether barred by the Statute of Limitations or not. *Edmunds v. Waugh* (1) and *In re Marshfield* (2) were instances of the first class of cases, and *Dingle v. Copper* (3), and *Lloyd v. Lloyd* (4), of the second class. The latter case, which was so strongly relied on by Mr. Brown, was a peculiar case in its facts, and it is difficult to see, on reading it, what was the exact ground upon which the full interest was there allowed to the mortgagee. But I accept as correct the statement of Farwell, L.J., in the subsequent case of *Hazeldine's Trusts* (5), that the only question decided in *Lloyd v. Lloyd* (4) was how much interest should be charged against the mortgagor as a term of allowing him to redeem.

(1) L. R. 1 Eq. 418.

(2) 34 Ch. D. 721.

(3) [1899] 1 Ch. 726.

(4) [1903] 1 Ch. 385.

(5) [1908] 1 Ch., at p. 40.



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When the principles of these cases are thus explained, it will be at once seen that they have no application whatsoever to sales under the Land Purchase Acts. A mortgagor selling to his tenants need not make any application to the Court to redeem the mortgages. He has a statutory power of sale, of which the Court cannot deprive him. He has that right quite independently of the wishes of the mortgagee. The latter can have no right of retainer, for the purchase-money never passes through his hands. The sale takes place entirely over his head, and he can only claim out of the purchase-money what he could have legally recovered prior to the sale.

For these reasons I am of opinion that the authorities relied upon by the mortgagees do not govern this case, and that we should follow the long line of authorities in this country that I have referred to, which decide that in circumstances such as exist in this case, arrears of interest which are barred by the Statute of Limitations should not be paid to the claimants.

Solicitors for the appellants : *Whitney & Moore.*

Solicitors for the respondents : *F. & C. Downing.*

R. ST. J. C.



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The words “delivery of possession by the mortgagor” in Order LV, Rule 7, are not to be read as merely ancillary to a sale ordered by the Court.

The Court will in a proper case make an order for the delivery of possession of the mortgaged premises by the mortgagor to the mortgagee, apart from any proceedings for sale.

*Semble*, such an order will not be made as a matter of course.

## ORIGINATING SUMMONS.

Application on behalf of the Governor and Company of the Bank of Ireland “for an order that possession might be delivered to them of all and singular the premises comprised in an indenture of lease, dated the 22nd February, 1832, and made between Sir Edward Denny, Baronet, of the one part, and Michael Slattery of the other part, for the natural life and lives of the three *cestuis que vie* in said lease mentioned, and the survivor of them, and for and during the natural life and lives of such other person or persons as might from time to time for ever thereafter be added thereto in pursuance of the covenant for perpetual renewal in said lease contained, subject to the yearly rent of 5s., which said premises are described in said lease as ‘all that and those a waste dwelling-house, part of the walls whereof were then standing, and a plot of ground to the rear thereof, late in the possession of Lewis M’Loughlin and Charles M’Loughlin, both deceased, containing by a survey or delineation thereof in front to the east 18 feet, and fronting Rock Street to the west by the extremity of a garden 148 feet, extending from the rear wall of the house intended to be built pursuant to the covenant therein mentioned, to the north bounded by Charles Moriarty’s concerns and premises, and to the south by Maurice Gloster’s or John

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Busteed's concern or premises, all which said premises are situate, lying, and being in the town and borough of Tralee, Barony of Trughanackmy, and county of Kerry, and which said premises are now known as No. 121 Lower Rock St., Tralee,' and for costs."

The summons was taken out on behalf of the Governor and Company of the Bank of Ireland, and was served upon Jane Slattery and James Ross, who were named as defendants therein, and upon all persons in possession of the premises. The summons was grounded on an affidavit of John Gardiner Fishbourne, the agent of the Governor and Company of the Bank of Ireland at their branch bank at Tralee. The affidavit, from which the facts of the case sufficiently appear, was as follows:—

"1. By indenture of lease, dated the 22nd February, 1832, and made between Sir Edward Denny, Baronet, of the one part, and Michael Slattery of Tralee, county Kerry, man-servant, of the other part, all that and those, &c. [*the same description of the premises as in the summons*], were demised unto the said Michael Slattery, his heirs and assigns, for and during the natural lives and life of the said Michael Slattery, Michael Slattery the younger, his son, and Connor O'Leary, and the longest liver and survivor of them, subject to the yearly rent of 5s. ; and said indenture contained a covenant on the part of the said Sir Edward Denny, his heirs and assigns, for perpetual renewal upon payment of the sum of two-pence upon each life as a renewal fine.

"2. By indenture dated the 21st January, 1863, and made between the said Michael Slattery, man-servant, of the one part, and Michael Slattery, subsequently of Rock Street, Tralee, flour and meal merchant, of the other part, the said premises were, in consideration of the sum of £5, granted and conveyed to the said Michael Slattery, of the second part, his heirs and assigns, from the day after the death of the said Michael Slattery, man-servant. The said Michael Slattery, man-servant, is long since dead.

"3. On the 13th October, 1894, the said Michael Slattery, merchant, deposited the said indentures of lease and conveyance with the said Governor and Company of the Bank of Ireland by way of equitable mortgage as a continuing and collateral security

for all moneys in which he then was or might thereafter become indebted to the said Governor and Company.

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"4. The last-named Michael Slattery, merchant, died on the 11th April, 1907, having previously made his last will and testament, dated the 6th March, 1907, whereby he devised and bequeathed to his daughter, the defendant, Jane Slattery, the said premises, and probate of his said will was on the 29th February, 1908, granted forth by the Principal Registry of the High Court of Justice in Ireland, King's Bench Division (Probate), to the defendant, James Ross, the sole executor thereof.

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"5. By indenture of mortgage, dated the 11th July, 1909, and made between the said James Ross of the first part, Michael Slattery, of Lower Rock Street, Tralee, shop-keeper, of the second part, the said Jane Slattery, of the third part, and the said Governor and Company of the fourth part, the said James Ross as personal representative of the said Michael Slattery, deceased, and the said Jane Slattery as beneficial owner, demised the said premises unto the said Governor and Company, their successors and assigns, for the term of 10,000 years by way of mortgage to secure the repayment of the sum of £919 14s. 9d., and interest thereon to be payable on demand. The said mortgage also comprised other property.

"6. Notice demanding payment of the said sum of £919 14s. 9d. and interest thereon at bank current rate, amounting to £53 18s. 2d., was, on the 22nd June, 1910, transmitted to all the parties to said indenture of mortgage, viz., the said James Ross, Michael Slattery, and the said Jane Slattery, but payment has not been made. [*The deponent referred to a duplicate of the said notice, and to the particulars of its transmission to the said persons in the fold thereof.*] The said sums, together with interest accrued thereon since the date of said demand, are now due and owing to the plaintiffs on the security of, *inter alia*, the said premises.

"7. I am informed by the plaintiffs' solicitor that hand searches were made on behalf of the plaintiffs by competent persons in the Registry of Deeds, from the 1st January, 1832, for the proper periods against the persons entitled to mortgage or charge the premises, viz., Michael Slattery, the lessee, Michael

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Slattery, the deceased, and the defendants Jane Slattery and James Ross, and it appears from said searches that the mortgage of the 17th July, 1909, to the plaintiffs is the only incumbrance affecting the said premises.

"8. The following persons, who are children of the said Michael Slattery, deceased, are, so far as I have been able to ascertain, at present in possession of the said premises, viz., Michael Slattery, Daniel Slattery, Maurice Slattery, and the said Jane Slattery, also Mrs. Mary Slattery, widow of the deceased.

"9. The other premises comprised in the said mortgage consist of licensed premises, known as No. 126 Rock Street, Tralee, aforesaid, held under lease, dated 23rd March, 1882, from John Bateman and Frederick R. Bateman, to Patrick Wallace for ninety-nine years from the 1st November, 1879, at the yearly rent of £25, and the lessee's interest in said premises subsequently became vested in the said Michael Slattery, deceased, who, by his will, bequeathed them to his son, Michael Slattery (save the stores attached thereto, which he bequeathed to the defendant, Jane Slattery). These premises were, on the 21st May, 1910, evicted by the landlord for non-payment of rent. Acting on the instructions of the last-named Michael Slattery, the premises were advertised for sale on the 2nd June, 1910, by Mr. R. D. Murphy, auctioneer of Tralee, but I am informed by the said R. D. Murphy, and believe that owing to the said Michael Slattery and his sister, Mrs. Margaret Ross, circulating a statement to the effect that the members of the Slattery family would not consent to a sale, he considered it unwise to hold a sale.

"10. It is the intention of the plaintiff to offer for sale all the premises comprised in their said mortgage, and as the sale of the last-mentioned premises (No. 126 Rock Street) has apparently been prevented through the active interference of the Slattery family, to ensure a successful sale, it is, in my opinion, essential that the plaintiffs be put into possession of the premises No. 121 Lower Rock Street, Tralee."

The affidavit referred to and incorporated the several documents mentioned, and they were produced in Court.



The notice, demanding payment, referred to in the affidavit, was in the following terms:—

“ I, the undersigned Thomas R. Lanphier, as the Secretary of the Bank of Ireland, do, pursuant to the provisions of an indenture, dated the 17th day of July, 1909, and expressed to be made between you, James Ross of the first part, you, Michael Slattery and Jane Slattery, of the second and third parts, and the Governor and Co. of the Bank of Ireland of the fourth part, HEREBY GIVE YOU NOTICE to pay and require and demand from you, the said James Ross, Michael Slattery, and Jane Slattery, the payment to one of the cashiers for the time being of the said Bank of Ireland, to the credit of the said Governor and Company, of the sum of £919 14s. 9d., payment of which is secured by the said indenture to the said Bank of Ireland, and now due to the said Governor and Company, together with interest thereon, computed to this date, amounting to £53 18s. 2d., making in all the sum of £973 12s. 11d., and further interest until actual payment, at the rate of 5 per cent. per annum. And I hereby give you notice that if the said sum of £973 12s. 11d. and interest shall not be paid as aforesaid, the said Governor and Company will forthwith proceed to sell the premises comprised in said indenture in pursuance and exercise of the power for that purpose given to them by the said indenture.

“ As witness my hand, this 22nd day of June, 1910.

“ THOMAS R. LANPHIER,

Secretary, Bank of Ireland.

“ To

“ MR. JAMES ROSS,

Kilmore, Ballyduff, Co. Kerry.

“ MR. MICHAEL SLATTERY,

Lower Rock Street, Tralee.

“ MISS JANE SLATTERY,

Lower Rock Street, 'Tralee.”

None of the defendants named in the summons appeared.

The summons was adjourned into Court for further argument.

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*Herbert Wilson, K.C., and E. S. Murphy, for the plaintiffs :—*

We apply for an order for delivery of possession by the mortgagors under Order LV, Rule 7. This rule differs from the corresponding English rule (Order LV, Rule 5a) by the omission of the word "foreclosure" before "delivery of possession by the mortgagor"; the decision of Stirling, J. (*Hill v. Stephens*, Cause Book, 1887, H. 2063), has no application to the Irish practice in mortgage suits. If the words "delivery of possession by the mortgagor" had been omitted from the Irish rule, the Court would have had ample jurisdiction to make an order for possession as ancillary to an order for sale. Order XXX, Rule 1 (8), prescribes a procedure by way of side-bar order in such cases. The retention of the words "delivery of possession by the mortgagor" when "foreclosure" was omitted requires the Court to attribute some distinct meaning to these words. Unless they contemplate a summons for delivery of possession, *simpliciter*, they are mere surplusage. The procedure by originating summons under Order LV is substituted generally for the former proceedings by action. This question is of considerable importance to Irish Banks by reason of the provisions of the Local Registration of Title (Ireland) Act, 1891, under which the legal estate in registered land is not conveyed to mortgagees.

#### THE MASTER OF THE ROLLS:—

In this case I was at first inclined to take a view different from the view I now hold. I now think the key-note of Rule 7 of the order in question is to be found in the words "an originating summons." Everything turns on the distinction drawn in Order LV, and clearly drawn, between "an originating summons" and an ordinary summons in an existing proceeding. The order on which the decision in this case must turn is Order LV. It is headed "Chambers in the Chancery Division." It commences with Rule 1, which is of a general character. Rule 2 provides that counsel shall not be heard in any case before the Chief Clerk. Rule 3 is a rule which deals with applications on summons in the Chambers of Judges of the Chancery Division, and is of a very extensive character. The first clause of Rule 4 is

to the following effect:—"The executors or administrators of a deceased person, or any of them, and the trustees under any deed or instrument, or any of them, and any person claiming to be interested in the relief sought as creditor, devisee, legatee, next-of-kin, or heir-at-law of a deceased person, or as *cestui que trust*, under the trust of any deed or instrument, or as claiming by assignment or otherwise under any such creditor or other person as aforesaid, may take out, as of course, an originating summons returnable in the Chambers of a Judge of the Chancery Division for such relief of the nature or kind following as may by the summons be specified, and as the circumstances of the case may require (that is to say) the determination without an administration of the estate or trust of any of the following questions or matters:—"

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It has been my lot to hear and determine a great number of questions under Rule 3 of that Order, and all I can say is that week by week I find myself more astonished at the jurisdiction thus cast upon a Judge at Chambers. It began, doubtless, in the idea that an originating summons would only be taken out in comparatively plain cases, and that no case of real doubt or real difficulty would be brought before the Court in the absence of that array of counsel that, within my own recollection, mustered in the Court of the Vice-Chancellor or the Master of the Rolls to discuss questions as to the true construction of a will. To-day, under this Order, two juniors come in on either side, and with great hesitation ask the Judge to put the case into the Court list. The fact is that these rules of Court, authorized as they are by the Judicature Act, have effected not a reform, but a revolution in procedure. And when a revolution has become an accomplished fact, it is idle to attempt to disregard it. Rule 6 provides the persons who are to be made parties under the two preceding Rules. Then comes Rule 7. After all, when one has got so far as the Rules under Order LV, I do not see that one ought to be alarmed by finding that the provisions relating to mortgagor and mortgagee and mortgagor and mortgagee are of the same revolutionary character as the preceding Rules. Now, what is the Rule I am dealing with?

"Any mortgagee or mortgagor, whether legal or equitable,

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or any person entitled to or having property subject to a legal or equitable charge, or any person having the right to foreclose or redeem any mortgage, whether legal or equitable, may take out as of course an originating summons, returnable in the Chambers of a Judge of the Chancery Division, for such relief of the nature or kind following as may by the summons be specified, and as the circumstances of the case may require; that is to say—sale, delivery of possession by the mortgagor, redemption, reconveyance, delivery of possession by the mortgagee.”

The words “originating summons” form, as I have said, the keynote of the Rule. One must look at the matter on the basis of the revolutionary tendency obviously present in these Rules, drawn up in the first instance by a committee of which the chairman was a Judge, whose qualifications for the post he adorned will not, I believe, for many years fade from the memory of the Irish Bar, Mr. Justice Andrews. He was not likely to go beyond the exigencies of the case. In my opinion, having regard to the fact that this is “an originating summons,” it is impossible to read it as a mere adjunct or accessory to a sale held in the Chancery Division.

Mr. Murphy in his admirable argument pointed out that Order XXX, Rule 1, provides for a side-bar injunction to the sheriff to put the purchaser into possession. It is plain that it is impossible to regard the words “delivery of possession by the mortgagor” as pointing to an application to the Court for an order to put a man who has bought from the Court into possession. As Mr. Murphy said, there would be no sense in interpreting the words in that way, having regard to the fact that a side-bar order for an injunction can be obtained without any trouble. Still there remains the point that it might be necessary to obtain an order for possession in advance, and there is no provision enabling the vendor-mortgagee by side-bar order or otherwise to get up possession from a mortgagor before he sells. But where a sale has been ordered, the Court of Chancery has the fullest power in a case in which it is obviously in the interest of the parties that possession should be got up before sale, as, for instance, where a mortgagor is wasting the property, or doing anything to prevent a sale, to order on a mere motion or summons, without a more formal procedure, the delivery up of the possession of the property

to some person appointed by the Court. And I have made orders over and over again directing the mortgagor to give up possession before the sale, in order that buyers and bidders might not be intimidated.

Again, there is the simple process of appointing a receiver pending the sale, and directing the mortgagor, if he insists on remaining in possession, to give up possession to the receiver.

But, to my mind, it is impossible to read those words, "delivery of possession by the mortgagor," as ancillary to a sale ordered by the Court in a suit by the mortgagee against the mortgagor, and the words would be useless and unnecessary if they mean delivery of possession by the mortgagor either before a sale by auction or after a sale by auction. They do not, in my opinion, depend on a sale ordered by the Court not yet had, or on a sale ordered by the Court and not yet completed. I can see no reason then why they should not apply to the case of a mortgagee desiring to go into possession of the mortgaged premises. It seems to me that the whole meaning of these rules has been, in cases peculiarly within the jurisdiction of the Court of Chancery, to substitute a simple and effective procedure for a complicated procedure in the King's Bench Division, and I cannot understand why, having gone so far as the Legislature and the Courts have gone, under section 61 of the Judicature Act, the administrators of the Act and the Rules of Court should hesitate to go the distance implied in Mr. Murphy's and Mr. Wilson's argument, and refuse to allow the mortgagee to enter on the premises as mortgagee in a suitable and proper case. I do not expect that there will be many applications under this Rule, for the simple reason that mortgagees do not like to go into possession in advance. And I do not say for a moment that an order of this character will be granted on originating summons as a matter of course. I merely say that, on the facts of this particular case, it is manifestly a case in which, if the jurisdiction exists, it should be exercised, and I exercise it accordingly.

I make an order for the giving up of possession. The mortgagees are to have costs with their demand.

Solicitor for the plaintiffs: *C. J. Rutherford.*

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Wylie, J. IN THE MATTER OF THE ESTATE OF THE IRISH LAND  
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*Land Purchase Acts—Congested estate purchased by Land Commission—  
 Undertakings by tenants to purchase—Power of Land Commission to  
 determine tenancies—Congested Districts Board (Ireland) Act, 1901  
 (1 Edw. 7, c. 34), s. 1—Irish Land Act, 1903 (3 Edw. 7, c. 37), s. 12,  
 sub-sect. 2—Irish Land Act, 1909 (9 Edw. 7, c. 42), s. 21.*

The powers conferred on the Irish Land Commission by section 12, sub-sect. 2, of the Irish Land Act, 1903, and section 21 of the Irish Land Act, 1909, to determine tenancies, where they have purchased a congested estate, can be exercised by them, where the tenancies proposed to be determined are non-judicial, notwithstanding the fact that undertakings by the tenants to purchase their holdings have been signed prior to the purchase of the estate by the Land Commission.

*Quære*—Can these powers be exercised in the case of judicial tenancies?

QUESTIONS of law submitted by the Estates Commissioners for the opinion of the Judicial Commissioner, pursuant to section 23 (1) of the Irish Land Act, 1903.

The facts appearing from the memorandum of the Estates Commissioners were as follows:—The Estates Commissioners, under the provisions of section 7 of the Irish Land Act, 1903, purchased this estate, which was vested in the Land Commission by order of the Land Judge, dated 27th October, 1908, and the purchase-money was paid on the 17th December, 1908. All the tenants on the estate had signed undertakings in 1905 to purchase their holdings at the respective amounts on the basis on which the price of the tenanted portion of the estate was estimated by the Estates Commissioners. These undertakings contained, *inter alia*, the following clauses:—

“I, \_\_\_\_\_ of \_\_\_\_\_, the tenant in occupation of the holding described in the first schedule hereto, hereby undertake as follows:—

“1. In case the Irish Land Commission buy, under the provisions of the Irish Land Act, 1903, an estate of which the said



holding forms a part, I will purchase the said holding from them for the sum of £ . . . . .

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“3. I hereby apply to the Irish Land Commission for an advance of the sum of £ . . . . . for the purpose of said purchase, to be repaid by an annuity of £ . . . . ., payable as is by the Irish Land Act, 1903, provided. The balance of the purchase-money (if any) over the amount of the advance under the Land Purchase Acts is to be paid as follows :— . . . . .

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“6. The said holding shall be vested in me in fee-simple, subject as hereinafter mentioned and as provided by the Irish Land Act, 1903.

“9. There shall be payable to the Irish Land Commission interest on the purchase-money at the rate of £3 10s. per cent. per annum from the date on which the Land Commission agree to purchase the estate up to the date of the advance, and at the rate of £2 15s. per cent. per annum from the date of the advance until the day from which the purchase annuity begins.

“10. The sale shall be carried out by means of a vesting order.”

The holdings had not yet been vested in the tenant-purchasers, but interest at the rate of 3½ per cent. on the purchase-money had been collected by the Land Commission from them, pursuant to the terms of the undertakings. The estate was a congested estate within the meaning of the Irish Land Act, 1903; and the holdings were in scattered divisions, long distances apart, and very inconvenient of access. The Estates Commissioners desired to carry out a consolidation scheme by which every tenant would, as far as possible, be given a holding or parcel in as few lots as possible, instead of as at present in scattered divisions. All the tenants on the estate were willing to fall in with the proposed re-arrangement, except three, who had objected to do so. The Estates Commissioners desired to exercise the powers conferred upon them by section 1 of the Congested Districts Board (Ir.) Act, 1901, as amended by section 12 of the Irish Land Act, 1903, and section 21 of the Irish Land Act, 1909, and proposed to determine the respective tenancies of the above-mentioned tenants in accordance with the provisions of the said Acts, and to provide

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each of them with a new holding, or to pay such compensation as might be determined pursuant to the said Acts, and they had certified to the Lord Lieutenant that the powers mentioned in section 1 of the Congested Districts Board (Ir.) Act, 1901, were necessary for the benefit or improvement of the said congested estate. In pursuance of the scheme, it was proposed to offer to each of the said three tenants a new holding, consisting of part of his old holding and partly of other lands at present comprised in other holdings. It was intended that the new holding to be offered to each of the said three tenants should be subject to a rent not exceeding that payable by him for his original holding, or should be sold to him at a price not greater than the price payable under his undertaking for his original holding, and should be of not less value, in respect of the land comprised therein and the buildings and improvements thereon, than at the date of the purchase of the estate by the Land Commission. The Estates Commissioners referred the following questions of law:—

1. Whether the provisions of section 1 of the Congested Districts Board (Ir.) Act, 1901, applied to the cases of the said three tenants, notwithstanding the fact that they had signed undertakings for the purchase of their original holdings?

2. Whether a holding consisting of part of the original holding and partly of other lands was a new holding within the provisions of section 1 (2) of the said Act?

*Wylie* (with him *Ronan, K.C.*) for the Land Commission:—

The powers given to the Congested Districts Board by section 1 (1) of the Congested Districts Board (Ir.) Act, 1901, to determine any tenancy where the tenants of holdings on the estate to the extent of not less than three-fourths in number and rateable value so request, are extended to the Estates Commissioners by section 12 (2) of the Irish Land Act, 1903. Section 21 of the Act of 1909 provides that these powers may be exercised whether the request by three-fourths of the tenants is made or not. The only question is whether these powers are affected by the undertakings to purchase signed by the tenants? These are not mutual agreements, but only agreements by the tenants that, if

the estate is sold, they will purchase if the Estates Commissioners wish them to do so. There is nothing in the nature of the agreement which binds the Land Commission to sell to the tenants. The Land Commission could compel the tenants to buy, but the tenants could not compel the Land Commission to buy unless something was done in the nature of part performance, or the tenants had been notified that their proposals had been accepted. The collection of interest by the Land Commission is a perfectly neutral fact. These men are still tenants notwithstanding the undertakings, which merely gave the Land Commission an option to purchase. Whether they were judicial tenants or not, there has been nothing to determine the relationship of landlord and tenant. These undertakings were obtained merely for the security of the Land Commission.

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I have no doubt on the facts and circumstances of this case that the Estates Commissioners can deal with these holdings in the manner proposed.

I must not, however, be taken as giving any opinion as to what would be the position if the tenants were judicial tenants, and if the estate were not a congested estate, as section 1 (1) of the Act of 1903 might apply under such circumstances; but, as this is a congested estate, that sub-section does not apply.

If I were to hold that the Estates Commissioners could not exercise the powers given to them by section 12 (2) of the Act of 1903, by reason of the tenants having signed undertakings to purchase, I would be reducing that sub-section to a nullity, because under sections 6 and 7 of the Act of 1903 the Estates Commissioners are bound to get such undertakings from the tenants to purchase their holdings before they can buy the estate. Therefore the power of the Estates Commissioners to buy the estate is actually based on such undertakings. It seems to me that the power given by section 12 (2) is an over-riding power where, as in the present case, the estate is a congested estate.

I therefore answer the first question "Yes."

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With regard to the second question, the procedure would be to determine the old tenancy, and give the tenant a holding with a different boundary, which might or might not include the whole or part of his former holding, but which would be, in fact, a new holding.

To the second question I also answer "Yes."

Solicitor for the Irish Land Commissioners: *W. Alexander.*

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### PATTEN *v.* HAMILTON (1)

Nov. 15, 16. *Principal and agent—Purchase by agent at an undervalue of charge on*  
 Dec. 5. *principal's estate—Onus probandi—Lapse of time—Presumption.*

Where an agent purchases at an undervalue a charge on the estate of his principal, and while in receipt of the rents charges his principal with interest on the face-value of the charge, the Court, in the absence of evidence that the principal after full disclosure of the circumstances consented to the agent retaining the full benefit of the transaction for his own use, will, in treating him as trustee for his principal, hold that the extra interest retained should be applied towards the extinguishment of the charge; and lapse of time, even though it may possibly have caused the loss of material evidence, will not shift the burden of proof, originally resting on the agent, to the principal.

APPEAL on behalf of the plaintiff from so much of the judgments of the Master of the Rolls, dated 30th June, 1910, as declared that as between the several parties to the action the sum of £477 9s. 1d., being the share of William Taubman in the assets of Hopkins Harris, assigned to William Maffett by indenture dated 30th August, 1841, was a valid and subsisting charge on the lands to which the action related.

The action was brought for the sale and distribution of the proceeds thereof (in lieu of partition) of certain lands in the city and county of Dublin, formerly owned by William Beeby and

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described throughout the proceedings as the Beeby estate. The parties to the suit besides the plaintiff were the defendants Susanna Hamilton, Marcella Adelaide Maffett, as executrix of William H. Maffett, Theodore Bell and Alice Caroline Bell, executor and executrix of the surviving trustee of the will of William Maffett, and Mary Anne Dumoulin and the Right Rev. John Philip Dumoulin (Bishop of Niagara). No question arose as to title, the whole estate being vested in the parties to the suit as tenants in common, and no objection to a sale was raised before the Master of the Rolls at the trial. In the statement of claim it was, however, alleged that interest had been charged to the owners in accounts rendered by their agents, William Maffett and William Hamilton Maffett, his son who succeeded him, on alleged incumbrances which the plaintiff believed were not charges on the estate, and instanced payments of interest to the defendants Bell and their testator as trustees of William Maffett.

The defendants Bell, in their statement of defence, alleged that as executors of the last surviving trustee of William Maffett they were entitled *inter alia* to £477 9s. 1d., part of the assets of Hopkins Harris, assigned by William Taubman to William Maffett by indenture dated 30th August, 1841. The plaintiff in her reply denied that this was a valid charge on the estate. The Master of the Rolls by his judgment decided that it was a valid charge, and this was the only point involved in the appeal from his judgment. The ground upon which its validity was disputed by the plaintiff and the defendants Du Moulin, was that Mr. William Maffett, while acting as agent over the estate, had purchased the charge in 1841, for £350, and had subsequently charged the plaintiff's predecessors in title and herself and her co-owners with 6 per cent. interest on the face-value, £477 9s. 1d.; and it was admitted that this was so, and that if interest at either 4 or 6 per cent. had been debited to the owners of the estate on £350 only, the sums in the hands of the agent would have paid off both principal and interest. The Master of the Rolls decided *against* the contention of the plaintiff and the defendants Dumoulin, and held the charge valid and subsisting.

Details of the material circumstances as appearing in evidence will be found stated in the Lord Chancellor's judgment.

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*S. L. Brown, K.C., Meredith, K.C., and John Donaldson, for the*  
plaintiff:--

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When an agent buys at an undervalue a charge on his principal's estate, he is deemed in equity to have purchased it as a trustee for the principal, and can only charge against him the actual price paid and interest thereon. This is an elementary principle: see judgment of Lord Cottenham L.-C., in *Reed v. Norris* (1). To the same effect are the observations of the same learned lord five years later, in *Carter v. Palmer* (2). The same rule was applied in *Hobday v. Peters* (No. 1) (3), to the case of a clerk of a solicitor consulted gratuitously by the client; so also with a receiver: *Boddington v. Langford* (4).

As to lapse of time in such circumstances: see *King v. Anderson* (5) where the equity was enforced after a period of thirty years, the Lords Commissioners and Christian, L.J., reversing the decision of the Vice-Chancellor.

The burden of showing that such a full disclosure of all material circumstances was made as would entitle the agent to retain the benefit of a purchase at an under-value lies on the agent: *Dunne v. English* (6). The nature and extent of such disclosure are stated by Sir G. Jessel, in his judgment at p. 535, adopting the argument of counsel for the appellants in *Imperial Mercantile Credit Co. v. Coleman* (7), and which he says is a fair and proper statement of the law. It is not enough that the principal is put on inquiry. He must have the fullest information given to him.

*G. Fitz Gibbon, K.C., J. H. Pigot, K.C., and William M'Grath,*  
for the Bishop of Niagara and Mrs. Du Moulin, supported the plaintiff's contention.

The question whether there was any evidence that the £477 9s. 1d. was originally or at any time a charge on the estate was scarcely argued, it being practically admitted by the owners that the long-continued payment of interest out of the rents was sufficient for that purpose.

(1) 2 Myl. & Cr. 361, at p. 374.

(2) 8 Cl. & Fin. 657, at p. 705.

(3) 28 Beav. 349.

(4) 15 Ir. Ch. R. 558 n.

(5) I. R. 8 Eq. 625.

(6) L. R. 18 Eq. 524.

(7) L. R. 6 H. L. 189, 194.

*W. M. Jellett, K.C.* (with him *Matheson, K.C.*, and *R. E. Osborne*), for the defendants Bell:—

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Admitting that *prima facie* an agent cannot buy at an under-value for his own benefit a charge on his principal's estate, yet he may be entitled to do so if, after full disclosure, the principal consents. Admitting further that the burden of proving such disclosure and consent lies in ordinary cases on the agent, we contend that the burden is shifted to the representatives of the principal where it is sought to challenge such a transaction after the period of time which has elapsed here, and after the death of principal and agent and of every person who could give evidence as to the matter. This may have been a purchase in its inception very favourable for the owners. It was a serious question whether or not the money was at all a charge on the estate, and it may have been for the interest of the principals that such a claim should be transferred from a possibly hostile to a friendly party.

In *Portlock v. Gardner* (1) *Wigram, V.-C.*, refused to direct an inquiry after the lapse of twenty years against an executor in respect of an alleged breach of trust: see cases collected in *Godefroi on Trusts*, 3rd ed., p. 870. The rule as to acquiescence is stated by Lord Campbell, L.C., in *Life Association of Scotland v. Siddall* (2), where he says: "Although the rule be that the onus lies on the party relying on acquiescence to prove the facts from which the consent of the *cestui que trust* is to be inferred, it is easy to conceive cases in which from great lapse of time such facts might and ought to be presumed." In *Baker v. Read* (3) an action to set aside the purchase by an executor of the testator's estate at an under-value was dismissed on the ground of delay, though seventeen years only had elapsed. Here sixty-nine years have passed; the right of Maffett as transferee to receive interests on the under-value of the security year after year remaining unquestioned. Is a purchaser under such circumstances liable to attack after centuries? In *Jones v. Turberville* (4) payment of a legacy was presumed after forty years: see judgment of Lord Commissioner

(1) 1 Hare 594.

(3) 18 Beav. 398.

(2) 3 De G. F. & J. 58, at p. 77.

(4) 2 Ves. Jun. 11.



*Appeal.* Eyre at p. 12a, and judgment of Lord Erskine, L.C., in *Hillary*  
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*F. Fleming, K.C.*, and *W. G. Gibson*, for the defendant,  
Marcella Adelaide Maffett, supported the contention of the  
defendants Bell.

*Meredith, K.C.*, in reply :—

The authorities cited by Mr. Jellett have no application to the present case. In all of them the active interference of the Court was invoked to set aside some voidable deed or transaction. We are not seeking any such relief. The rule of equity we rely on declares Mr. Maffett a trustee for his principal, and presumes that he discharged his duty by applying the surplus interest he charged in his accounts to wiping out the charge he had so acquired. We ask the Court merely to act upon admitted facts, and the irresistible inferences from them. The respondents ask the Court to presume a gift.

Dec. 5.

THE LORD CHANCELLOR :—

This is an action for sale in lieu of partition, and, in the alternative, for partition of lands in the city and county of Dublin, held under leases for lives renewable for ever, or fee-farm grants into which the leases have been converted, and which collectively may be called the Beeby Estate.

The title to the land is deduced in the statement of claim through one Mrs. Beeby, who died in 1779, and it is admitted that the plaintiff, Elizabeth Victoria Patten, is entitled for life to two undivided ninths, and the other defendants are entitled to seven-ninths in various proportions.

The judgment in such an action would, *prima facie*, be a simple one, and the tolls and charges on the lands would be ascertained by the usual inquiries. The pleadings, however, raised, and the evidence in the action, and the judgment are conversant with, a dispute as to the existence as a charge on the Beeby estate of an incumbrance called the Taubman charge,

which was bought by Wm. Maffett, the agent over the estate. Wm. Maffett was agent over the lands from 1813 till his death in 1865. He was succeeded in the agency by his son, Wm. Hamilton Maffett, and the latter acted as agent till 1903.

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It appears that recently a small portion of the lands in the county of Dublin was compulsorily acquired by the Blackrock Co. Council, and on account of the difficulty as to title, the purchase-money was paid into Court, and an inquiry was directed by Mr. Justice Barton as to the title of claimants to the fund. The defendants, Mr. and Mrs. Bell, claimed to be paid out of the fund as representing Maffett, but Mr. Justice Barton considered that those were questions which would more properly be decided in an action. In the course of this inquiry a deed of 3rd August, 1841, was produced, which showed that on that date Wm. Maffett, the agent, bought up a charge of £477 9s. 1d. from one Wm. Taubman, and paid for it, not £477 9s. 1d., but a sum of £350 only, and it appears that from that date on till his death, and afterwards during the time of Wm. Hamilton Maffett, and subsequently, interest at £6 per cent. on the entire charge was deducted and recovered by the Maffetts out of the rents of the Beeby estates.

The plaintiff thereupon raised the question, and she was supported in this by some of the defendants, that there was no evidence that such a charge on the Beeby estate for £477 10s. could be shown to exist at all; and, secondly, if it did, that as Wm. Maffett was agent in 1841, he could not acquire the full charge for £350 only, and that it was paid off by perception of the rents and retention of them at the rate of £6 per cent. on £477 9s. 1d., which would make the charge cease to exist some years since, if he was only entitled to retain interest at £6 per cent. on £350.

It is not usual at the first hearing to raise and decide such a question as to a charge in a partition suit; but the Master of the Rolls, for the convenience of the parties, heard and decided these questions, and we do not think that we ought now to adopt a different course.

The Master of the Rolls by his judgment has declared that as between the persons who are parties to the action the sum of £477 9s. 1d. is a valid and subsisting charge on the Beeby estate,



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and that the plaintiff, or any other party to the action, is not entitled to any declaration or inquiry or order against the estates of the defendant Wm. Hamilton Maffett, or the defendant Marcella A. Maffett, with respect to the said charge or the interest thereon, and he directed the inquiries usual in actions of the present nature.

The appeal is only from so much of the judgment as contains declarations in respect of the Taubman charge and the interest on the £477 9s. 1d.

As to the first question, viz., admitting this Taubman charge is an incumbrance on the Beeby estate, the deed of 1841 throws no light on it, and, on the contrary, seems inconsistent with it. It appears from the recitals in it that Wm. Beeby, who died in 1789, being administrator with the will annexed of one Hopkins Harris, committed a breach of trust in respect of a sum of £2450, portion of those assets, by paying it to Wm. Whitmore, who executed a mortgage to indemnify Beeby. Taubman was entitled under the will of Hopkins Harris to £477 9s. 1d., portion of the £2450. Thomas Beeby, administrator of Wm. Beeby, continued to pay interest thereon. The deed recites that Wm. Maffett had agreed to purchase the interest of Taubman in the assets of Hopkins Harris, and in consideration of £350, paid by Maffett, he, Taubman, assigned his share in the assets of Hopkins Harris to Maffett. There is no mention of the £477 being a charge on the Beeby estate. But it appears that for twenty years at least before 1841, interest on this sum of £477 had been paid out of the Beeby estate through the hands of Maffett, who knew all the circumstances, and it is entirely too late now to question its existence as a charge on the Beeby estate. The Master of the Rolls so decided as between the parties, and so far I see no reason to dissent from his judgment.

The plaintiff, however, in the alternative, contends that the Taubman charge which Maffett bought must be deemed to be now paid off. William Maffett was agent over the Beeby estate, and received the rents and paid the outgoings out of them, including interest on the Taubman charge at £6 per cent. He paid not £477 9s. 1d., but £350 only—and it is an elementary rule of a Court of Equity that an agent cannot charge against his principal more



than the £350 he himself paid, with interest on it—and was a trustee of the surplus for his principal. He undoubtedly deducted as against them out of the rents 6 per cent. on the entire £477 9s. 1d., and to the extent of the surplus this was a deduction which he was not entitled to make, and was an over-payment on foot of the charge.

The books of William Maffett leave it obscure whether the fact of the transfer of the Taubman charge to Maffett was disclosed; but there are two entries in the long period since 1841 which so treat it as transferred, and one of them mentions Maffett as assignee; but there is nothing to indicate that he only paid £350, and yet paid himself £6 per cent. on £477 9s. 1d. The onus is on Maffett to show that he made some arrangement with or obtained some consent from his principals, that he was to receive as against him interest on the entire £477 9s. 1d., and the principals were, I think, entitled to assume, as Maffett debited them with the full interest, that he had bought for and paid £477 9s. 1d., and that thus the deductions were in accordance with his duty.

It was strongly pressed that after the lapse of time from 1841 it must be assumed that the principals assented to a purchase by him for £350, and to the deduction of the full interest. But this is not like the case of setting aside a purchase by a trustee. The question is, what is the legal effect of admitted acts, and what are the inferences to be drawn? The *prima facie* inferences are those which are consistent with the duty of Maffett till the onus is shifted by some proved conduct of Maffett.

There is no imputation on the honesty of Maffett, or any reason to impute to him moral misconduct. He probably was not aware of the disability to claim more than £350 and interest on that sum.

It is not disputed that treating the charge on that basis it must be deemed to have been paid off some years ago, and the plaintiff does not seek any relief against Mr. and Mrs. Bell beyond a declaration as against them that the Taubman charge must be deemed to have been paid off; and I think she is entitled to that declaration with such costs as against the defendants Bell as are properly incident to that part of the controversy.

Accordingly we must allow the appeal to that extent.

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HOLMES, L.J. :—

The primary object of this action was to have a sale or partition of what has been called throughout the case the Beeby estate, consisting of valuable freehold lands and houses in County Dublin, to two-ninths of which the plaintiff is admitted to be entitled.

This property belonged to William Beeby, who died in 1789; and the statement of claim deducing title from him shows that it is now vested in undivided shares in several specified persons in addition to the plaintiff, most of whom are defendants to the action. This pleading, after stating in fourteen paragraphs the present title to the premises, proceeds to allege that the management and receipt of the rents of the property were in the hands of William Maffett, in whom, by deed of 6th May, 1850, the premises were vested as a trustee for the then beneficial owners; that the accounts furnished by him were accounts only showing the distribution of the net income among the co-owners; and that the plaintiff had recently discovered that large payments had for many years been made out of the gross income under colour of being interest on alleged incumbrances which are not incumbrances on the plaintiff's share, and are not, as she believes, charged upon the property at all. It is then stated that such payments of interest have been made, amongst others, to the defendants, Mr. and Mrs. Bell, as trustees of the will of William Maffett. I am disposed to think that neither the object nor the effect of this paragraph was to raise an issue to be decided on the first hearing of the action, but to show that the more appropriate relief would be not partition, but sale, so that these matters could be considered in the distribution of the purchase-money. Mr. and Mrs. Bell, in their defence, after stating their title to one-ninth share of the premises, set forth eight incumbrances affecting the property to which they allege they are entitled, and on which they say interest had been regularly and properly paid. The present appeal is conversant with the first of these charges, being the sum of £477 alleged to be charged on all the premises, and assigned by William Taubman to William Maffett by deed of the 30th August, 1841. The plaintiff, in her reply, denied that this was a valid and subsisting charge on the Beeby estate; but her counsel tell us that they assumed

that this, like many other questions in the case, would be disposed of when the property was sold, and the purchase-money was being distributed in Chambers. This would have been, I think, the usual and probably the more convenient course, as some infants interested in the estate were not before the Court, and, therefore, not bound by the proceedings. The Master of the Rolls, however, decided to hear it; and there was, I think, no real surprise, as the matter had already been discussed in proceedings before Barton, J. A small portion of the Beeby estate having been acquired by virtue of compulsory powers, the purchase-money was paid into Court; and Mr. and Mrs. Bell, claiming to have vested in them the first incumbrance on the property, applied to have the money paid out to them in discharge thereof. The deed of 1841 was produced by them in support of their case; and the claim based on it was disputed by the plaintiff or some other of the owners on the grounds relied on in this Court. I have not been informed of the view taken or the order made by Barton, J., but I understand that he did not accede to the application. I shall now state my reasons for thinking that it ought not to have been granted, and for holding that so much of the Master of the Rolls' judgment as declares the charge of £477 to be a valid and subsisting charge on the Beeby estate cannot be sustained. We have been told that William Maffett was receiver or agent over this property from the year 1815, collecting the rents and paying the outgoings till his death in 1865, and that he was succeeded in this position by his son, William Hamilton Maffett, who died in 1903, and whose executrix, Marcella Adelaide Maffett, is one of the defendants. We have also been told that William Maffett from 1821, if not earlier, to 1841, paid out of the income of the estate interest at the rate of 6 per cent. per annum upon a sum equal to £477, present currency, to William Taubman; and I assume that these statements can be verified by books kept by Mr. Maffett which are still in existence. By the deed of the 30th August, 1841, William Taubman assigned to him this sum; but the recitals in that instrument not merely fail to show that this money was a charge affecting the Beeby estate, but are rather inconsistent with its being so. It appears from these recitals that William Beeby, who died in 1789, being the administrator with the will annexed

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*Appeal.* of Hopkins Harris, misapplied about £2400 of that gentleman's  
 1910. assets by paying them to William Whitmore, who executed  
 PATTEN mortgages of certain lands belonging to him to indemnify Beeby  
 v. from the consequences of this breach of trust. It is further  
 HAMILTON. recited that William Taubman had become, under the will of  
 Holmes, L.J. Hopkins Harris and subsequent instruments, entitled to £477,  
 portion of the £2400 already mentioned, and that Thomas Beeby,  
 the administrator of William Beeby, had continued to pay interest  
 thereon, the final recital being that William Maffett had agreed with  
 William Taubman for the purchase of all the latter's estate and  
 interest in the assets of Hopkins Harris. Then follows the assign-  
 ment of all Taubman's undivided share in the assets of Hopkins  
 Harris in the hands of Thomas Beeby as administrator of William  
 Beeby, or secured by the mortgages of William Whitmore or  
 otherwise howsoever, together with all interest due or to grow due  
 thereon.

It is quite clear that no charge on the real estate of William Beeby is here assigned in express terms; and it is strange if such a charge then existed that it was not conveyed to William Maffett, who ought to have known of its existence. It is argued on behalf of the plaintiff that the only inference that can be drawn from this document is that William Taubman's share in the assets of Hopkins Harris was never charged on the freehold property of William Beeby, with which alone this action is conversant; but if this be so, how is the payment of the interest out of the income of that property for twenty years prior to 1841 to be accounted for? William Maffett, who possessed great experience and a large business as land agent, must have had some reason to believe that the debt to Taubman was charged on the Beeby estate before he began to pay, and whilst he was paying, interest thereon out of the rents collected by him; and at this distance of time I would prefer to believe that the solicitor who prepared the assignment of 1841 was insufficiently instructed as to the nature of the security, than to hold that the sum assigned was not an incumbrance on the lands which for such a long period supplied the annual interest. There is, however, another matter appearing in this deed, which I must assume to be accurate. The consideration given for it by William Maffett, as appears from both the rental and receipt, was £350. If the



£477, bearing interest at 6 per cent. per annum, was a charge on the Beeby estate, it is difficult to understand why Taubman sold it for a smaller sum. The estate was then and has always been thoroughly solvent; and its owners for the ninety-five years during which the books of the agents go back have been receiving a large income after payment of all outgoings. Taubman's sacrifice of £127 may have arisen from the apparent defect of title or from some pressure that obliged him to get the money without delay; but whatever was the cause, the owners were the persons to be benefited by it. The law is so clear on this point that it is unnecessary to refer to authority; I may, however, quote the language of Lord Cottenham in *Reed v. Norris* (1): "I take the case of an agent. Why is an agent precluded from taking the benefit of purchasing a debt which his principal is liable to discharge? Because it is his duty on behalf of his employer to settle the debt upon the best terms he can obtain; and if he is employed for that purpose, and is able to procure a settlement of the debt for anything less than the whole amount, it would be a violation of his duty to his employer, or at least would hold out a temptation to violate that duty, if he might take an assignment of the debt and so make himself a creditor of his employer to the full amount of the debt which he was employed to settle." In the present case, Maffett was not specially employed to settle this particular debt; but, as the general agent to manage the estate, to receive all income, and to discharge all outgoings, his obligation and duty were at least equally great if not greater.

No lawyer can doubt that from the date of this purchase he was only entitled to charge against his employers £350, with annual interest thereon at the rate of either 6 per cent. or 4 per cent.; but as a matter of fact, down to his death in 1865, they were debited by him each year with interest on £477 at the rate of 6 per cent.; and after his death the same interest was paid by his son William Hamilton Maffett to his trustees. There has been some controversy as to whether the owners ever became aware of the assignment of Taubman's debt to Maffett; and it is somewhat strange that in the books kept in his office, there

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(1) 2 Myl. & Cr. 360.



*Appeal.* are only one or two entries during his lifetime that would  
 1910. suggest that there had been any transfer of this sum. There  
 PATTEN is no evidence that the owners were ever made aware of  
 v. Maffett's purchase, until the deed of 1841 was produced in  
 HAMILTON. Mr. Justice Barton's Court; but I do not regard it as material  
 Holmes, L.J. whether they knew it or not. If they did know it, they were  
 entitled to assume when they were debited with the same interest  
 as was paid to Taubman that Mr. Maffett had purchased for  
 £477; and the burden of proving that, having paid only £350,  
 he had made some agreement or arrangement with his principals  
 that he, not they, were to be benefited thereby, is on those  
 claiming under him. I need hardly say that there is no  
 evidence of such an agreement; and if the lapse of time has  
 disabled both parties from giving evidence on this subject, so  
 much the worse for the party on whom rests the *onus probandi*.  
 I may refer on this branch of the case to *Dunne v. English* (1),  
 in which Sir George Jessel deals with the burden of proof in  
 cases where an agent purchases for his own benefit.

Cases have been quoted in which Courts have declined after  
 a long delay to set aside purchases made by trustees or other  
 persons in a fiduciary position: but these authorities are not  
 applicable to this case. We are not asked to set aside any  
 transaction. We are only required to give legal effect to what  
 was actually done; and we cannot decline to do so, because  
 there may have happened something additional of which we have  
 no evidence. I would add that, in coming to this conclusion, I  
 acquit Mr. Maffett of any misconduct and intentional or moral  
 fraud. He was not aware that the law forbade him from deriving  
 any personal benefit from the bargain with Taubman; and I assume  
 that he honestly thought that the effect of the assignment was to  
 give him all the rights of the assignor. In this he was mistaken;  
 but of course he and those who succeeded him were entitled to  
 a charge of £350, with interest thereon: and although it is a little  
 doubtful, I hold the rate of interest to be 6 per cent. If so calcu-  
 lated, the full principal and interest have been paid some time  
 ago; but Mr. Brown tells us that his client does not ask for an

(1) L. R. 18 Eq. 524.

account, and will be satisfied with a declaration that the charge having been satisfied is not now subsisting. The appeal therefore is allowed with costs, to be paid to the appellants by the defendants, Mr. and Mrs. Bell, who must also pay the plaintiff so much of the costs of the hearing in the Rolls Court as relate and are incidental to the question of whether the charge of £477 is now subsisting.

*Appeal.*  
*1910.*  
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*Holmes, L.J.*

CHERRY, L.J. :—

Two questions arise in this case which are questions of mixed law and fact—(1) Whether the sum of £477 9s. 1d., being the share of one William Taubman in the assets of Hopkins Harris, deceased, is, or ever was, a valid charge on the Beeby estate; and (2), assuming that it was, is it now a subsisting charge, or has it been redeemed for the benefit of the owners of the estate?

The origin of this charge is involved in mystery. No deed or document of any kind creating it has been produced, nor is there in the recitals or operative part of the deed of 30th August, 1841, by which it was assigned to the late William Maffett, anything to show how it came to be a charge on this estate at all. Nevertheless, interest at the rate of 6 per cent. per annum upon it has been regularly paid by the receiver or agent over the estate for more than 100 years. This is the sole evidence before the Court that the charge was ever a valid one against the estate.

It is, of course, true that from the payment of interest alone, for a long period, the Court may presume the existence of some deed or other instrument creating a charge; and were it not for the recitals contained in the deed of 1841, it would be almost a matter of course to do so in the present case. But these recitals seem to establish that it was a charge not upon this, but upon an entirely different estate. However, inasmuch as even at that date the interest upon it had been paid out of the Beeby estate for nearly forty years, I am prepared to assume that it was then, and continued to be, a valid charge thereon. I am glad to be able to do so, for if we came to the conclusion that it was never a valid charge on the Beeby estate, our decision would apparently apply also to another alleged charge on the estate, the owners of which have not been heard upon this appeal.

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The second point raised by the plaintiff is a more serious one. It appears that this charge of £477 9s. 1d. was in the year 1841 purchased by William Maffett for a sum of £350, and assigned to him by William Taubman by a deed dated the 30th August, 1841, which is in evidence. William Maffett had been then receiver or agent over the Beeby estate since the year 1813, and he continued to be in the sole management of it down to his death, which occurred in the year 1865. He paid himself regularly until that event interest at 6 per cent. upon the full sum of £477 9s. 1d., and the same interest has been paid to his representatives since his death. The plaintiff contends that these payments have completely redeemed the charge for the benefit of the owners of the estate.

It is well settled law that if a trustee, or any person occupying a fiduciary position with regard to an estate, buys up any debt or incumbrance to which the estate is liable for a less sum than is actually due thereon, he will not be allowed to take the benefit of the purchase to himself, but the *cestuis que trust*, or the owners of the estate, will become entitled to claim it, unless it can be shown that they were aware of all the material circumstances connected with the purchase, and acquiesced in his keeping the benefit of it for himself. Here it is not denied; on the contrary, it is expressly admitted that William Maffett was in a fiduciary relation to the owners of the estate, who were, even in 1841, very numerous. If he purchased as trustee, his sole right would be to be repaid the amount of the purchase-money with interest. It is clearly proved that he and his representatives have received out of the estate since his purchase more than sufficient to repay them this sum (£350) with interest at 6 per cent. to the dates of payment.

But it is said that the Court ought to presume, without a particle of evidence, that he communicated all the facts connected with the purchase to the then owners of the estate, and that they agreed to waive their rights to the benefit of the purchase. I do not think that there is any rule of law compelling us to make such a presumption; and I most certainly would not make it unless constrained to do so. If I were at liberty to draw an inference from the facts which are proved, I should come to the very opposite

conclusion ; but it is sufficient to say that there is no evidence of any such knowledge and acquiescence on the part of the owners of the estate. Mr. Jellett cited a number of cases to show that the onus of proof was shifted by lapse of time, and argued that in this case we should require the plaintiff to prove absence of knowledge and acquiescence. But the cases he relied upon were all cases where it was sought to set aside a transaction as fraudulent ; and it was very naturally held that the onus of proving that a transaction was fraudulent lay on the person who alleged it after a long interval of time. I do not think that these cases apply here, where there is no allegation of fraud, and no attempt made to set aside any transaction upon any ground whatsoever. The only question we have here to determine is, for whose benefit, under the particular circumstances, is a purchase to enure ?

For these reasons I concur with the other members of the Court in holding that it should be declared that this sum of £477 9s. 1d. is not now a subsisting charge on the Beeby estate, but that it has been redeemed for the benefit of the owners thereof.

Solicitor for the plaintiff : *Arthur F. Maffett.*

Solicitor for the defendant Susanna Hamilton : *Charles P. O'Neill.*

Solicitors for the defendant the Bishop of Niagara : *Moore, Keily, & Lloyd.*

Solicitor for the defendant Marcella Adelaide Maffett : *Edward S. Maffett.*

Solicitors for the defendants Bell : *Alexander Bell & Sons.*

W. G.

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## L'ESTRANGE v. WINNIETT.

(1910. No. 1073.)

*Ross, J.*     *Marriage settlement—Portions for younger children—Children “other than*  
                   *1910.                    an eldest or only son”—Younger daughter debarred from taking as a*  
*Dec. 16, 20.                younger child—Elder daughter taking as a younger child.*

By a settlement executed in 1843 lands were conveyed to trustees to L'E. for life, with remainder to his sons in tail-male, with remainder, in default of male issue, as to two of the lands, to his female issue as L'E. should appoint, and as to the other land to certain other issue in tail male, with a power to L'E. to charge the lands with a sum of £3000 as a provision for the younger child or children of L'E.

By a marriage settlement executed in 1850 on the marriage of L'E., L'E., in pursuance of said power, charged the said lands with the sum of £3000 in favour of the younger children of the intended marriage “other than an eldest or only son.”

There were no sons of the marriage. L'E. by his will appointed the lands over which he had power of appointment to his younger daughter in fee-simple.

*Held*, that the existence of a son was not required to bring into operation the provision of the charge for younger children; that the younger daughter, having taken the bulk of the lands under the limitations of the settlement, was debarred from taking under the provision for younger children, and that the elder daughter alone took under the said provision.

## ORIGINATING SUMMONS.

By indenture of settlement dated 15th July, 1843, the lands of Cartronganny, Winetown, and Clownstown were conveyed to trustees, to hold the same upon trust, as to the lands of Cartronganny, and three acres of Winetown, to the use of Thomas L'Estrange the elder for life, and as to the said lands, subject to his life estate therein, and as to the remainder of the lands of Winetown and Clownstown, to the use of Torriano L'Estrange for life, and after his death to the use of Thomas L'Estrange the younger for his life, with



remainder to his first and other sons in tail male, and in default of male issue, and in the event of there being female issue of Thomas L'Estrange the younger, then, as to the said lands of Clownstown and Winetown, to the use of such female issue as Thomas L'Estrange the younger should by deed or will appoint, and as to the said lands of Cartronganny, in default of such male issue of Thomas L'Estrange the younger, to the sons of Torriano L'Estrange, by a second marriage in tail male, and in default of such male issue to the daughters of said marriage, and their issue. The said settlement conferred on Thomas L'Estrange the younger a power by deed to charge the premises with a sum of £3000 as a provision for the younger child or children of Thomas L'Estrange the younger.

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1910.  
*L'ESTRANGE*  
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By deed of marriage settlement dated 7th June, 1850, and executed on the marriage of Thomas L'Estrange the younger, the said Thomas L'Estrange the younger, in pursuance of the power given him as aforesaid, charged the lands of Cartronganny, Winetown, and Clownstown, but subject to the life estate of Thomas L'Estrange the younger, with payment of the sum of £3000 as a provision for the younger child or children of said intended marriage in manner therein provided, that is to say, in case there should be more than one younger child of the said intended marriage other than an eldest or only son, then the said sum of £3000 should go and be divided amongst the said younger children in equal shares, or if there should be but one younger child other than an eldest or only son, then the whole to such only child, the portion or portions to become vested in the case of sons at twenty-one years, and in the case of daughters at twenty-one years, or marriage.

Thomas L'Estrange the younger died on 22nd January, 1910, leaving two daughters, of whom Mary Sarah was the elder, and the plaintiff, Jane Frances, was the younger.

By will, made in 1904, Thomas L'Estrange the younger, in exercise of the power of appointment given him by the deed of 1843, appointed all the lands over which he had power of appointment, that is to say, the lands of Winetown and Clownstown, to his younger daughter, Jane Frances L'Estrange, in fee-simple, and the testator settled a sum of £2000 upon his daughter Mary

*Ross, J.* Sarah Purcell, on condition that she would release all claims  
 1910. on said lands on account of said charge of £3000.  
*L'ESTRANGE* In the events that happened the lands of Cartronganny passed  
*v.*  
*WINNIETT.* to the defendant Mrs. Eliza Winniett and others, issue of  
 Torriano L'Estrange by a second marriage.

In the year 1907, Thomas L'Estrange the younger, as tenant for life of the lands of Winetown, Clownstown, and Cartronganny, sold them to the tenants under the Land Law (Ireland) Acts for the sum of £8990, which after redemption of all superior interests and costs was reduced to £5562.

The plaintiff, who was the sole surviving trustee of the settlement of 1843, and the younger of the two daughters of Thomas L'Estrange the younger brought the present summons for the determination of the following among other questions:—

1. Whether the lands of Cartronganny, or the purchase-money thereof, are well charged by the settlement of 7th June, 1850, with any, and, if so, what, proportion of the sum of £3000 charged upon the three townlands of Cartronganny, Winetown, and Clownstown, for the benefit of the younger children of Thomas L'Estrange the younger?

2. Whether the plaintiff and the defendant Mary Sarah Purcell (both daughters of Thomas L'Estrange the younger) are younger children within the meaning of the settlement of 7th June, 1850, and, if one only, which one?

*S. L. Brown, K.C.*, and *G. H. Brett*, for the plaintiff:—

It is admitted that the plaintiff, who by the limitations of the settlement takes the bulk of the settled property, cannot claim to be a younger child: *Macoubrey v. Jones* (1), *Farwell* on Powers, p. 498.

*D. M. Wilson, K.C.*, and *Longfield*, for the defendant, Mrs. Purcell:—

“Younger child” means such child as has not been provided for by the limitations of the settlement. The younger daughter, who has taken the lands, becomes the eldest son, and Mrs. Purcell

is a younger child, other than the eldest son : *Simpson v. Frew* (1). The result would be different if the words were "other than, and besides an eldest son," because there you must have an eldest son *in rerum natura* to make good the class of younger children : *In re Flemyng's Trusts* (2). Thomas L'Estrange the younger might have left out one of the daughters altogether ; therefore there was a necessity of having a charge for younger children, even though there was no eldest son.

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*R. F. Harrison, K.C.*, and *J. S. Baxter*, for the defendant, Mrs. Winniett:—

Two or more properties subject to a common charge, which are severed, from the time of severance are charged rateably : *Leonino v. Leonino* (3). The charge for younger children fails. According to the settlement the lands, in default of male issue, were to go to the daughters, as their father should appoint. The settlement presupposes that there is a male capable of taking, and only in that event does the power to charge arise. There is no reason why it should take effect if there were no son, because ample provision is made for the daughters by the original settlement. The power to charge does not arise at all when there are no sons. In *Walcott v. Bloomfield* (4), where the portions were held not to be raisable, the word used was "besides," not "other than and besides." In *Simpson v. Frew* (1) the words were "other than." The lands were limited to the daughters in tail. The only daughter died married. The charge was for children other than an eldest or only son. It was held that the daughter was not a daughter other than an eldest or only son. *Flemyng's Trusts* (2) is in our favour ; there the words used were "other than or besides."

Ross, J. :—

Dec. 20.

The questions raised are conversant with a settlement of 1843, a settlement of 1850, and a will of Thomas L'Estrange the younger, executed in 1904. The settlement of the 15th July,

(1) 5 Ir. Ch. Rep. 517.

(3) 10 Ch. D. 460.

(2) 15 L. R. Ir. 363.

(4) 4 Dr. & War. 211.

*Ross, J.* 1843, deals with the lands of Cartronganny, Winetown, and  
 1910. Clownstown. Cartronganny and three acres of Winetown are  
*L'ESTRANGE* settled to the use of Thomas L'Estrange the elder, for life. The  
*v.* same lands, subject to the life estate of Thomas L'Estrange the  
*WINNIETT.* elder, are settled along with the rest of Winetown and Clownstown to the use of Torriano L'Estrange for life, then to the use of his son, Thomas L'Estrange the younger, for life, with remainder to his first and other sons in tail male. In default of male issue Clownstown and Winetown were to go to the use of the female issue as Thomas L'Estrange, junior, should by deed or will appoint. Cartronganny was to go to the sons of Torriano L'Estrange by a second marriage, and on failure of male issue to the daughters of that marriage or their issue. Male issue did fail, and Cartronganny is now vested in the events that happened in the daughters or their issue. The settlement contains a power to charge £3000 for younger children.

The second settlement is dated the 7th June, 1850, and was executed on the marriage of Thomas L'Estrange. After providing for a jointure, he proceeds, by virtue of the power contained in the preceding deed, to charge the three denominations with £3000 as a provision for the younger child or children of the intended marriage.

The said Thomas L'Estrange the younger died on the 22nd January, 1910, leaving two daughters, Mary Sarah, who married Mr. Purcell, and the plaintiff, Jane Frances L'Estrange.

We now come to the third instrument, the will of Thomas L'Estrange, in which he exercised the power of appointment conferred on him by the settlement of 1843, and appointed the lands over which he had the power of appointment, that is, Winetown and Clownstown, to the use of his youngest daughter, the plaintiff, Jane Frances L'Estrange. The testator settled a sum of £2000 upon his daughter Mrs. Purcell, on condition of her releasing all claim on the said lands.

All the lands were sold by Thomas L'Estrange the younger, and the net proceeds of Cartronganny are agreed to be taken at £2135, while the net proceeds of Winetown and Clownstown are taken to be £3427.



On these facts the Court is asked to determine four questions. *Ross, J.*

First, whether the lands of Cartronganny are well charged by the settlement of 1850 with any, and, if so, what, proportion of the sum of £3000 charged upon the three townlands for the benefit of the younger children? *1910.*  
*L'ESTRANGE*  
*v.*  
*WINNIETT.*

The settlement of 1843 simply confers the power of charging £3000 as a provision for the younger child or children. The settlement of 1850 in execution of the power creates the charge of £3000 for the younger child or children of the marriage in manner hereinafter provided, that is to say, in case there shall be more than one younger child of the marriage other than an eldest or only son, then the sum is to be divided in equal shares; but if there shall be but one younger child other than an eldest or only son, then the whole to such only child, the portion or portions to be vested interests.

The question is, does this latter provision presuppose or involve the actual existence of an eldest son, and in case there is no such eldest son, does the charge of £3000 become inoperative?

It is not necessary for me to discuss in detail the cases of *Walcott v. Bloomfield* (1), a decision of Lord St. Leonards, and *Simpson v. Frew* (2), a decision of Lord Chancellor Brady.

The result is briefly stated by the Vice-Chancellor of Ireland in *In re Flemming's Trusts* (3). "From this it follows that if the words are 'other than an eldest or only son,' the daughters would take portions as being others than an eldest or only son, while the words, 'besides an eldest or only son,' require the existence of a son to give them operation."

Neither in the settlement of 1843 nor in the settlement of 1850 do the words "besides an eldest or only son" occur. Therefore, the existence of an eldest son is not required to bring the provisions of the charge of £3000 into operation.

The words used in the settlement of 1850 create the charge of £3000 in the first place; and when we come to construe what follows "in manner provided," the expressions used are not such as require the actual existence of an eldest son as a condition on which the charge becomes operative, I must therefore answer

(1) 4 Dr. & War. 211. (2) 5 Ir. Ch. Rep. 517. (3) 15 L. R. Ir. 363.



*Ross, J.* the first question by declaring that the lands of Cartronganny and  
1910. the lands of Winetown and Clownstown are well charged by the  
*L'ESTRANGE* settlement of 1840 with the sum of £3000.  
*v.*

*WINNIETT.*

As Cartronganny goes to one set of persons, and Winetown and Clownstown to another, it is plain that these lands must bear the charge in proportion to their respective values at the time when the separation of interest took place. But as their present value has been ascertained by sale, it may be arranged that the amount falling upon either division of the lands may be ascertained by reference to the purchase-money.

The second question is, whether the plaintiff and defendant, Mrs. Purcell, are younger children within the meaning of the settlement of 7th June, 1850, or, if one only, which one. There can be no doubt that inasmuch as the bulk of the estate has gone to the plaintiff, Jane Frances L'Estrange, she is incapable of taking any of the provision for younger children, and, therefore, Mrs. Purcell alone answers to the description of a younger child.

The third question is, whether the defendant, Mrs. Purcell, is bound to elect between the £2000 bequeathed to her by the will of Thomas L'Estrange the younger, and so much of the £3000 as is charged upon Winetown and Clownstown.

There is no room for doubt here; she cannot take the £2000 under the will, and any part of the charge that is placed on Winetown and Clownstown. She is, therefore, bound to elect.

The fourth question is, who are entitled to the proceeds of the sale of the lands?

The answer is that Winetown and Clownstown belong to the plaintiff absolutely. Cartronganny goes in thirds to the defendant, Eliza Mary E. V. Winniett, John Charles W. L'Estrange Burges, and Augusta Praye. It is not necessary to administer the trusts of the settlement.

Solicitors for the plaintiff: *L'Estrange & Brett.*

Solicitors for Mrs. Winniett: *W. B. Galway & Boas.*

Solicitor for Mrs. Purcell: *W. Jasper Brett.*

BRITISH LEGAL AND UNITED PROVIDENT ASSU-  
RANCE COMPANY, LTD., v. BARON SHEFFIELD  
AND OTHERS.

M. R.  
1911.  
Jan. 17.

*Practice—Pleading—Motion for particulars—Delivery of particulars before  
defence—Libel—Insurance Company.*

In an action brought by the P. Assurance Company against A, B, and C, the trustees of the L. Insurance Society and D, E, and F, certain agents of the L. Society, to restrain them from interfering with the business of the P. Company, the statement of claim alleged (*inter alia*) that “the said D, E, F, and other agents and servants of the L. Society, at the instigation of the said Society and of the said D, E, and F, have for the purpose of inducing the policy-holders of the P. Company to cease insuring with the P. Company, and to transfer their insurances to the L. Society, made grossly false statements and representations to the policy-holders in the P. Company” to a certain effect, and that “D, E, and F also themselves circulated among the policy-holders in the P. Company, and caused to be circulated by other agents and servants of the L. Society, a grossly libellous notice or circular imputing certain charges against the P. Company, and that the said notice or circular letter continues to be circulated among the policy-holders of the P. Company by the said D, E, and F.”

*Held*, that before delivering their defence, A, B, and C were entitled to obtain from the plaintiffs further and better particulars as to (1) the persons by whom, (2) the localities in which, and (3) the period within which, the alleged grossly false statements and representations were made, and also particulars as to whether any of the policy-holders to whom it was alleged the false representations were made were resident outside a certain district named by the plaintiffs, but that they were not entitled to receive particulars of the names and addresses of the several persons to whom the false representations were made.

THIS was a motion on behalf of certain of the defendants, who were the trustees of the Royal Liver Friendly Society, that the plaintiffs furnish to the said defendants further and better particulars in respect to the allegations contained in the first part of paragraph 14 of the statement of claim (set forth below), that is to say, the following particulars, the persons by whom, the persons to whom, the places where and the time when “the grossly false statements and representations” were made.

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The plaintiffs were a life assurance company registered in Scotland, and having a branch office in the city of Dublin. Much of the business carried on by the plaintiff company was what is known as "industrial" assurance, in which the premiums are paid weekly in small sums. This action was brought against the trustees of the Royal Liver Friendly Society and against three former agents of the plaintiffs who had taken service with that society for the purpose of obtaining (*inter alia*) an injunction restraining the defendants, their and the Royal Liver Friendly Society's servants and agents, from soliciting or canvassing the policy-holders of the plaintiff company to cease or transfer to any other company or society their insurances with the plaintiff company, or take out any new insurance with any other company or society, or from making use of the information obtained by the defendants, George Barnes, Thomas Groome, and Patrick W. Sheppard (the former agents of the plaintiffs), while in the service of the plaintiffs, and from circulating or causing to be circulated the libellous notice or circular mentioned in paragraph 14 of the statement of claim, and from making use of any false statements or misrepresentations with regard to the solvency or financial position or other the merits or comparative merits of the plaintiff company, and from making use of any books, documents, or copies of or extracts from any such books or documents, or of any other information of whatsoever nature obtained by said George Barnes, Thomas Groome, and Patrick W. Sheppard as agents of the plaintiff company. The statement of claim alleged (*inter alia*) that the said defendants, George Barnes, Thomas Groome, and Patrick W. Sheppard, while they were still in the employment of the plaintiffs, and immediately after the determination of such employment, and after their engagement by the Royal Liver Society, proceeded to canvass and solicit persons insured with the plaintiff company for the purpose of inducing them to cease insuring with the plaintiffs, and to transfer their policies of insurances in the plaintiff company to the Royal Liver Society, and that in canvassing and soliciting such persons they made use of the knowledge and confidential information acquired by them while in the service of the plaintiffs. It further alleged that the said confidential information was disclosed to the Royal Liver Society by the said defendants, and used by the

said society and its agents for the purpose of inducing the policy-holders in the plaintiff company to transfer their insurances to the said Royal Liver Friendly Society.

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Paragraph 14 of the statement of claim was as follows:—

“The said three defendants, George Barnes, Thomas Groome, and Patrick W. Sheppard, and other agents and servants of the said Royal Liver Society, at the instigation of the said society and of the said defendant agents, have for the purpose of inducing the policy-holders in the plaintiff company to cease insuring with the plaintiff company, and to transfer their insurances to the said Royal Liver Society, made grossly false statements and representations to the policy-holders in the plaintiff company, to the effect that the plaintiff company is breaking up and is insolvent and unable to pay its liabilities, and that the said Royal Liver Society is taking over its business. The said three defendants also themselves circulated among the policy-holders in the plaintiff company, and caused to be circulated by other agents and servants of the Royal Liver Society, a grossly libellous notice or circular letter imputing that the plaintiff company was insolvent, and that persons insuring therein would lose their money, and the said notice or circular letter continues to be circulated among the policy-holders of the plaintiff company by the said agents.”

The solicitors for the defendant trustees of the Royal Liver Society wrote to the solicitors for the plaintiffs, asking for further and better particulars as to certain matters referred to in certain paragraphs of the statement of claim. The particulars asked for as to paragraph 14 were as follows:—

“As to paragraph 14—Exact particulars are required of the grossly false statements and representations alleged to have been made by the three defendants, Barnes, Groome, and Sheppard, and other agents and servants of the defendant society, to the effect that the plaintiff company was breaking up and was insolvent and unable to pay its liabilities, and that the said defendant society was taking over its business, and giving particulars of the time when, the place where, the persons by whom, and persons to whom each of such grossly false statements and representations were made; and particulars are also required of the time when,



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the place where, the persons by whom, and the persons among whom the grossly libellous notice or circular letter was circulated and is now being circulated."

To this letter the plaintiffs' solicitors (Messrs. D. & T. Fitzgerald) replied, on the 3rd January, 1911, giving certain particulars.

The portion of their letter dealing with paragraph 14 was as follows:—

"As to paragraph 14—The false statements and representations made by the three defendants, Barnes, Groome, and Sheppard, and other servants and agents of the defendant society, are, or their effect is, given with sufficient particularity in the said paragraph, and the plaintiffs do not feel bound to give any further particulars in relation thereto, save as follows:—That the notice or circular letter alluded to in the same paragraph was circulated broadcast by the said three defendant agents and other servants and agents of the said society, in some cases through the post, and in other cases by hand, amongst the policy-holders of the plaintiff company within the Dublin district. The period during which the said circulation took place, the plaintiffs say, subject and without prejudice to any facts given in evidence at the trial of this action, was from August 18th, 1910, up to the day upon which a hearing was had of the motion for an interlocutory injunction in this action."

The defendant trustees thereupon brought forward the present application for further and better particulars.

*Herbert Wilson, K.C.*, and *Mooney*, for the defendant trustees of the Royal Liver Society.

We are entitled to particulars as to the persons by whom, the persons to whom, the places where, and the time when the representations were made. The statement of claim contains what is in effect a count for libel, and on the common law side we should be entitled to these particulars in an action for libel. Order XIX., R. 7, *Wylie's Judicature Act*, pp. 375, 376. We are entitled to information before defence: *Roselle v. Buchanan* (1). The same

(1) 16 Q. B. D. 656.



principle was applied in an action for slander of title: *Roche v. Meyler* (1).

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*Matheson, K.C., and Edward Fitzgerald*, for the plaintiffs:—

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The application is premature. Even assuming that these particulars are necessary to prevent surprise at the trial, they cannot be necessary for the purpose of settling the defence. The defendants are not prejudiced by not receiving these particulars. The names of the agents who made these alleged slanderous statements are already within the knowledge of the defendants, who can also find out from those agents when and to whom they made the statements referred to. This is not an action for slander, as can plainly be seen from the statement of claim. The plaintiffs complain not so much of the making of the statements as of the purpose for which they were made. It is not the practice to give the same detailed particulars in the Chancery Division as in the King's Bench Division. No case of the giving in the Chancery Division of such particulars as are asked for here has been referred to. In a case of this sort it would be especially dangerous to give what would be in effect the names of our witnesses, as the witnesses, being in a humble station of life, might be tampered with.

Particulars of names and addresses were refused in *Duke & Sons v. Wisden & Co.* (2)—a case which is in many ways similar to this one.

*Mooney* in reply:—

If the gist of the action be for an injunction, it is unnecessary to give particulars; *contra* if the libel be relied on as a substantial portion of the cause of action. Particulars of the persons to whom the slanders were uttered were ordered in *Bradbury v. Cooper* (3).

THE MASTER OF THE ROLLS:—

In my judgment the letter of Messrs. Fitzgerald of the 3rd January, 1911, so far as it relates to paragraph 14 of the state-

(1) [1896] 2 I. R. 35.      (2) 77 L. T. (N. S.) 67.      (3) 12 Q. B. D. 94.

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ment of claim, does not give to the defendant trustees the particulars to which they are entitled, even at this stage of the proceedings. The letter does not, I think, sufficiently differentiate between the "grossly false statements and representations" alleged in the earlier part of paragraph 14 and the circular letter referred to in the latter part of the same paragraph. Messrs. Fitzgerald say . . . [His Lordship read the letter] 'This answer leaves the defendants in ignorance of the persons (other than the three named agents) by whom these "grossly false statements and representations" were made. It leaves the defendants in ignorance of the times when, and the periods within which, they were made. The letter does not, I think, leave the defendants without information as to the persons to whom the representations were made. The alleged statements were made to "policy-holders," and if the pleadings or particulars had narrowed the class of persons so indicated to policy-holders residing within a given district, I think that was all the information which (at least at this stage of the proceedings) the trustees could fairly ask the plaintiffs to disclose.

I cannot go the length to which Mr. Wilson and Mr. Mooney urge me to go, and compel the plaintiffs to give names and addresses. No matter how honourable and high-minded the trustees of this society may be—and I am sure they are honourable and high-minded gentlemen—there is no doubt that an order involving some 700 policy-holders and requiring the plaintiffs to give their names and addresses might have the effect of stimulating persons not authorized by the trustees into more or less undesirable activity in anticipation of the trial. Mr. Matheson and Mr. Fitzgerald not unfairly suggest that the defendant trustees are in point of fact asking the plaintiffs at this stage to hand over the names of the witnesses they intend to examine upon the trial of the action. I am not prepared to make an order in a case of this description which would or might have that effect, at all events at this stage of the proceedings. On the other hand, how could the defendant trustees plead to paragraph 14, which alleges that these false statements were made at their instigation not only by the three named defendants, but by other agents and servants of the society—an allegation which leaves

open to the plaintiffs a field as wide as the area covered by the army of persons who are or have been in the employment of the defendants, without some particulars? I think that the trustees are entitled at this stage to know definitely and clearly the names of the persons other than the three specially named defendants who, as agents or servants of the defendant society, are charged with publishing the alleged false and libellous statements to the detriment of the plaintiff society. Furthermore, I think it is essential that the defendant trustees should know, not merely in respect of the circular, but also in respect of these alleged statements, the period within which it is alleged such statements were made. Accordingly I propose—and I think there is ample authority for my decision—to make an order that the plaintiffs do give further and better particulars as to the persons by whom, the localities in which, and the period within which, the alleged grossly false statements and representations were made, and also particulars as to whether any of the policy-holders to whom it is alleged these false representations were made were resident outside the Dublin district.

I do not require the plaintiffs to give particulars of addresses, but merely of localities. I do not require names, but I direct the plaintiffs to localize “the policy-holders” as resident within a given district or given districts.

I direct costs to be costs in the cause.

Solicitors for the plaintiffs: *D. & T. Fitzgerald.*

Solicitors for the defendant trustees: *George D. Fottrell & Sons.*

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*Wylie, J.* IN THE MATTER OF THE ESTATE OF HENRY BRUEN,  
1910.  
Dec. 1, 6. JUNIOR.

*Settled land—Assignment of life estate by first tenant for life to second tenant for life—Merger—Power of sale—Settled Land Act, 1882 (45 & 46 Vict. c. 38), ss. 2, sub-s. 5, 3, 50, 51.*

Where the first tenant for life of settled lands has assigned his life estate to the second tenant for life under the settlement, so that the life estate of the former has become merged in that of the latter, the power of sale conferred on a tenant for life by the Settled Land Acts can be exercised by the second tenant for life, notwithstanding the provisions of sect. 50 of the Settled Land Act, 1882.

Observations of Chitty, L.J., in *In re Mundy and Roper's Contract*, ([1899] 1 Ch., at p. 296), and of Swinfen Eady, J., in *In re Barlow's Contract* ([1903] 1 Ch., at p. 384), considered.

QUESTION arising on allocation affecting the right of the vendor to receive the bonus payable in respect of the purchase-money advanced under the Land Purchase Acts. The facts on which the question arose, as stated in the judgment of Wylie, J., were as follows:—

By a settlement of the 15th November, 1886, the lands sold in this matter were limited to the Right Hon. Henry Bruen, father of the vendor, for life, with remainder to the vendor for life, with remainder to the first and other sons of vendor in tail male, with remainders over. By a voluntary conveyance of the 30th November, 1897, the Right Hon. Henry Bruen conveyed his life estate to the vendor. On the 23rd November, 1907, the vendor having entered into agreements with the tenants for sale of the settled lands under the Land Purchase Acts, lodged an originating application with the Land Commission to carry out said sale; and on the 4th August, 1910, the "estate" was declared by the Estates Commissioners, and the purchase-money lodged in bank. The Right Hon. Henry Bruen was still alive.

The question was now raised as to whether the vendor had power to sell the settled lands?

*Gerald FitzGibbon, K.C., and C. Murphy, for the vendor :—*

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The vendor was entitled to sell as tenant for life for the time being beneficially entitled in possession, whether under the settlement of the 15th November, 1886, or under a compound settlement consisting of that settlement and the conveyance of the 30th November, 1897. The effect of the conveyance of 1897 was to merge the first life estate under the settlement in the life estate of the vendor: *Mayhew's Law of Merger* (1); *Preston's Abstract of Title* (2). The vendor accordingly came into possession by virtue of an accelerated life estate, and not as assignee of his father's life estate.

But even assuming that there was no merger, under sect. 58, sub-sect. 1 (v), of the Settled Land Act, 1882, the vendor was entitled to sell as tenant for the life of his father, not holding merely under a lease at a rent. The policy of the Act was to facilitate the striking off from the land the fetters imposed by the settlement: *Chitty, L.J., in In re Mundy and Roper's Contract* (3). Prior to the Settled Land Act, 1884, the power of sale could be vested in different persons at the same time. This was the case under section 63 of the Settled Land Act, 1882.

*Herbert Wilson, K.C., and Frank Fitz Gibbon, for the Right Hon. Henry Bruen and the trustees of the settlement :—*

The power of sale under the Settled Land Acts cannot now exist in two persons at the same time. It is impossible for a person who has become tenant for life within the meaning of section 2, sub-section 5, of the Settled Land Act, 1882, to divest himself, during his life, of the powers conferred on a tenant for life by the Act. Whether or not the life estate of the vendor was accelerated, section 50 of the Settled Land Act, 1882, is a complete answer to his claim to be a competent vendor: *In re Cramer Roberts' Estate* (4); *In re Power's Estate* (5); *In re Ker's Estate* (6).

(1) At p. 52.

(2) Vol. iii., pp. 225-230.

(3) [1899] 1 Ch., at p. 288.

(4) [1907] 1 I. R. 483; [1908] 1 I. R. 222.

(5) [1907] 1 I. R. 51.

(6) [1908] 1 I. R. 293.



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WYLIE, J.:—

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A rather curious question has been raised in this case affecting the right of the vendor to receive the bonus. The facts upon which the question arises, so far as they have been laid before me, are these. [His Lordship stated the facts as above set out.] Now, counsel on behalf of the Right Hon. Henry Bruen contend that the right to sell the settled lands remained vested in him notwithstanding the conveyance of the 30th November, 1897, and that the vendor had no power to sell during his father's lifetime. This contention was based entirely on the provisions of section 50 of the Settled Land Act, 1882. That section provides that "the powers under this Act of a tenant for life are not capable of assignment or release, and do not pass to a person as being, by operation of law or otherwise, an assignee of a tenant for life, and remain exercisable by the tenant for life after and notwithstanding any assignment, by operation of law or otherwise, of his estate or interest under the settlement," and that any contract by him not to exercise his powers is void.

Now, the meaning of that section, I think, is very clear so far as it goes, and the many decisions upon it leave no doubt as to its meaning up to a certain point; and I think the effect of the section and of the decisions is this, that once a person is a tenant for life of settled land within the meaning of section 2, sub-section 5, of the Settled Land Act, 1882, and having, as such, the powers conferred upon a tenant for life by said Act, he cannot, so long as he is such tenant for life, deprive himself of any of these powers by any assignment or release or contract not to exercise them, and, subject in certain cases to the consent of the assignee, they remain exercisable by him notwithstanding any assignment, by operation of law or otherwise, of his estate, and do not pass to any person as his assignee.

It is plain, therefore, that the power of sale which was vested in the Right Hon. Henry Bruen on the date of the conveyance of the 30th November, 1897, did not pass to the vendor as his assignee. This, I think, disposes of one ground on which Mr. Fitz Gibbon relied in support of his contention that the vendor had a power of sale, viz., the provisions of section 58, sub-section 1 (v), which give the powers of a tenant for life to a

tenant in possession for the life of another, because if the vendor in this case was in possession of the lands as tenant for the life of his father, it must have been as assignee of his father's life estate.

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But, then, Mr. Fitz Gibbon's other ground of contention is this, that the vendor at the time of sale was in possession, not as assignee of his father's life estate, but by virtue of his own estate as next tenant for life, either under the settlement of 1886, or under a compound settlement consisting of that settlement and the conveyance of 1897. His contention is that the conveyance of 1897, having vested in the vendor the life estate of his father, and the vendor being next tenant for life in remainder after the father's life estate, and there being, as was admitted, no intermediate estate to prevent merger, the effect of the conveyance in conjunction with the settlement was to merge the father's life estate in the life estate of the vendor, with the result of extinguishing the life estate of the father and accelerating the life estate of the vendor.

This contention, it seems to me, is clearly right in point of law, and, therefore, when the vendor, after the conveyance of 1897, entered into and continued in possession and receipt of the rents and profits of the settled lands, it must have been as tenant for his own life of those lands, either under the settlement of 1886 or the compound settlement consisting of that settlement and the conveyance of 1897.

This being so, had the vendor as such tenant for life a power of sale under the Settled Land Acts? Mr. Wilson, on behalf of both the Right Hon. Henry Bruen and the trustees of the settlement of 1886, says "no"; and contends that the power to sell the settled lands conferred by the Settled Land Acts cannot be vested in two different persons at the same time, that once a person has become tenant for life of the settled lands within the meaning of section 2, sub-sect. 5, of the Settled Land Act, 1882, the Act confers upon him a power of sale which nothing that may happen can deprive him of, and which must remain in and be exercisable by him during his life, and, this being so, that a power of sale cannot during his life be vested in any other person.

Now, the provisions of the Settled Land Act, 1882, bearing

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upon this question are sections 2, sub-section 5, 3, 50, and 51. Section 2, sub-sect. 5, defines the person in whom as tenant for life the powers conferred by the Act are vested. Section 3 confers on the tenant for life the power of sale. Section 51 makes void any provision in any instrument tending or intended to prevent the tenant for life from exercising or to induce him not to exercise his powers under the Act. Then section 50, as we have seen, in effect prevents a tenant for life, *i.e.*, as defined, from depriving himself of these powers or passing them to anyone else.

Now, in order to see the meaning and effect of section 50, it is necessary to bear in mind the definition of "tenant for life." I could understand the argument of Mr. Wilson, as to the effect of this section, if the Act had conferred the powers given to a tenant for life upon the person who was the first tenant for life under a settlement. But, referring to the definition in section 2, sub-sect. 5, the powers are conferred on the person who is *for the time being*, under a settlement, beneficially entitled to possession of settled land for his life. That is the person to whom section 50 applies, whether he happens to be the first, second, or third tenant for life.

Now, in the events that have happened, who was the person, at the date of the sale in this case, *for the time being*, under the settlement, beneficially entitled to the possession of the settled lands for his life? Was it the vendor or his father? It seems to me clear, for the reasons already given, that, upon the execution of the conveyance of 1897, the vendor, either under the settlement of 1886 alone or under the compound settlement constituted by it and the said conveyance, under which the settled land then stood limited, became beneficially entitled to the possession of the settled land, and accordingly the tenant for life in whom the powers under the Act became vested, and thenceforth the provisions of section 50 applied to the vendor and not to the father.

This I think will be seen to be in accordance with the other provisions of the Act and with decided cases. By section 58, sub-sect. 1 (vi), the powers of a tenant for life under the Act are conferred upon "a tenant for his own . . . life . . . , whose estate is liable to cease in any event during that life, whether by expiration

of the estate, or by conditional limitation, or otherwise." Now, until the event happens which determines his estate, such a tenant for life has a power of sale under the Act, and section 50 applies to him. But if the event happens before the power of sale is exercised, and some one else, therefore, under the settlement becomes entitled beneficially to the possession of the settled lands, could it be successfully contended that the tenant for life whose estate had determined could still exercise a power of sale by reason of the provisions of section 50? I think not; and it seems to me I am supported in this by *In re Levy's Trusts* (1), *In re Haynes* (2), and *In re Trenchard* (3).

Now, if this be so, does the fact that the father's estate was in this case determined by merger through an act of his own make any difference?

In giving judgment in *In re Mundy and Roper's Contract* (4), Chitty, L.J., after referring to this power of sale and the effect of section 50, says: "It may be that if the settlement consists merely of a life estate in A. with remainder to B. in fee, and A. surrenders his estate to B., the power is gone under the doctrine of merger; and that such a case is not within the section, because where the settlement is thus brought to an end, and exhausted, there is no reason why such a power should continue after the absolute fee-simple is vested in possession. I say "may be," because it is not necessary to consider such a case, which does not arise upon the facts before us." And Swinfen-Eady, J., in *In re Barlow's Contract* (5), referring to the above observations of Lord Justice Chitty, says: "But those observations which are prefaced by the words, 'it may be,' are directed to a case where an entire life estate has merged, so that the fee-simple is vested in possession, and are based on the assumption that in such a case there is no reason why the powers should continue. In the present case, where at most only a portion of the life estate is gone, and the life tenant is still beneficially entitled to the remaining portion, and where it

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(1) 30 Ch. D. 119.

(2) 37 Ch. D. 306.

(3) [1902] 1 Ch. 378.

(4) [1899] 1 Ch., at p. 296.

(5) [1903] 1 Ch., at p. 384.



*Wylie, J.* may be to the interest of all parties that she should be able to exercise her powers, I am of opinion that her powers still continue as to the entirety.”

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Now I cannot, of course, treat those cases as decisions on the point, but it seems to me that, having regard to the object and purpose of the Settled Land Acts, this is a stronger case than the one referred to in these judgments, because by the merger here of the first life estate the second life estate is accelerated and brought into possession, and thereupon the person entitled thereto becomes the tenant for life under the settlement of the settled lands with all the powers conferred by the Acts upon a tenant for life, and therefore there is not only no reason why the powers of the first tenant for life should continue, but there is every reason why they should not, because the person who is *for the time being* entitled to the possession of the settled land is the person who was intended to have and should have the power of sale.

On the whole case, therefore, I am of opinion that the vendor had power to sell, and having sold, is entitled to the bonus.

It is not necessary for me to decide whether the power of sale formerly vested in the vendor's father continued exercisable by him, as he has not sold under it, or whether concurrent powers of sale can coexist in different persons.

Solicitors for all parties : *T. T. Mecredy & Son.*

J. E. W.



LORD MAYOR, ALDERMEN, AND BURGESSES OF *Barton, J.*  
DUBLIN *v.* THE KING. 1910.

(1908. No. 44.)

Feb. 2, 5, 9,  
10.  
Mar. 11.

*Appeal.*  
Oct. 31.  
Nov. 1.  
Dec. 12.

*Pauper lunatics — Maintenance — County Councils — Local Government (Ireland) Act (61 & 62 Vict. c. 37, s. 58 (1), (2)), s. 109—Appropriation Act, 1900 (63 & 64 Vict. c. 57)—Petition of right—Money under the control of the Lord Lieutenant virtute officii.*

Up to the 31st December, 1897, the maintenance of the lunatic poor in the several district lunatic asylums in Ireland was supplied by capitation grants provided in the Appropriation Acts of each year, each such Act covering the calendar year immediately preceding up to the 31st December. In this way the cost of maintaining such lunatic paupers in the Richmond Asylum, with which the Dublin Corporation, in conjunction with three counties, were chargeable, was paid up to the 31st December, 1897. By the Local Government (Ireland) Act, 1898, the control of such asylums was transferred to the county councils thereby created, including the Corporation of Dublin; the capitation grants by Appropriation Acts were to cease, and, *inter alia*, a sum was annually to be paid from the Consolidated Fund to an account called the Local Taxation (Ireland) Account equal to the amount of the duties ascertained to be the proceeds in the previous financial year of the duties collected in Ireland on certain taxation licences, and the Lord Lieutenant of Ireland was directed to pay in respect of each local financial year out of this account to the county councils, four shillings per head per week for each pauper lunatic in a lunatic asylum managed and conducted to his satisfaction. The financial year was from the 1st April to the following 31st March (sect. 59), and by the Local Government (Application of Enactments) Order, 1898, schedule and article 19, the accounts of county councils, their committees and officers, were directed to be made up yearly to the 31st March in each year, thus abrogating the provisions of the Lunatic Asylums (Ireland) Accounts Audit Act, 1868 (31 & 32 Vict. c. 97), sect. 5, under which the accounts of asylums were made up to the 31st December in each year. Following on this legislation, the first yearly payment out of the Local Taxation (Ireland) Account was made in the year 1899 in respect of the cost incurred in the year ending the 31st

*Barton, J.* December, 1898, and the subsequent payments were made in respect of each  
 1910. previous financial year calculated from the 1st April to the 31st March,  
 DUBLIN leaving the three months from the 1st January, 1899, to the 31st March,  
 CORPORATION 1899, unprovided for. This having apparently attracted the notice of the  
*v.* Legislature by the Appropriation Act, 1900 (63 & 64 Vict. c. 57, schedule B.,  
 THE KING. part 13, No. 5), a sum of £37,030 was paid into the Local Taxation (Ireland)  
 Account. The estimate on which the Act was based (1) showed that the  
 object was to recoup that Account for a payment of a like amount assumed to  
 have been paid thereout, or at least chargeable thereon for the three months,  
 from the 1st January to the 31st March, 1898. The Lord Lieutenant, however,  
 acting on the advice of his legal advisers, declined to apply any portion of the  
 additional sum paid to the Local Taxation (Ireland) Account in the recoupment  
 of the county councils, including the Dublin Corporation, for their expenses  
 of maintenance of pauper lunatics during the first quarter of 1899, notwith-  
 standing a prolonged correspondence between the Corporation and the Under  
 Secretary to the Lord Lieutenant, in which each party propounded their views.  
 Eventually the Corporation presented a petition of right which was filed by  
 His late Majesty King Edward 7, claiming £3059 0s. 1d., which was admittedly  
 their proportion of the amount (if any) to be recouped.

*Held*, by Barton, J., and the Court of Appeal that the suppliants were  
 entitled to the relief prayed. The views expressed by the Lord Chief Baron in  
*Kildare County Council v. The King* ([1909] 2 I.R. 199) as to the cases in  
 which a petition of right is the proper remedy, approved of and followed.

#### TRIAL OF ACTION.

The petition of right was as follows :—

1. The Richmond District Lunatic Asylum, situate in the city and the county of Dublin, is the district asylum established by Acts of Parliament and Orders thereunder for the city of Dublin and the counties of Dublin, Louth, and Wicklow; and the lunatic poor chargeable against the councils of the said city and counties have been for many years maintained, housed, and clothed in said asylum.

2. Certain capitation grants for the lunatic poor so maintained, housed, and clothed in the several district lunatic asylums in Ireland were voted by Parliament and provided for in the Appropriation Acts, as set out in the first schedule hereto, and the proper proportion thereof was duly paid to the Board of Governors of said Richmond Asylum.

(1) See *infra*, p. 104, where the estimate is stated in the Lord Chief Baron's judgment.

3. By the Local Government (Ireland) Act, 1898, sect. 9, it is enacted that it should be the duty of the council of every county to provide and maintain sufficient accommodation for the lunatic poor in that county in accordance with the Lunatic Asylums Acts therein specified, and that the duties of the council should be exercised through a committee appointed by them, and that there should be transferred to the council acting through that committee the business of the governors and directors of the asylum under the Lunatic Asylums Acts, and that the committee, subject to the general control of the council as regards finance, might act without their acts being confirmed by the council, and that the council, through the said committee, should properly manage and maintain every lunatic asylum for the county, and that the Board of Control for Lunatic Asylums should be abolished, and that where a district for a lunatic asylum comprised two or more counties the said section should apply, with the necessary modifications, to those counties and to the councils thereof, and that the expenses should be defrayed by the several counties in proportion to the number of lunatics from each county according to the average of the three local financial years which ended next before the last triennial election of county councillors, and the committee for the asylum should be a joint committee of the councils of the counties with a representation of each council in the same proportion as that in which the expenses are defrayed.

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4. Section 109 of the said Act provides that the Local Taxation (Ireland) Account has the same meaning as in the Probate Duties (Scotland and Ireland) Act, 1888, and the said account is the account in the Bank of Ireland, into which the sums ascertained to be payable in relief of local taxation in Ireland are paid every financial year.

5. Section 58, sub-section 1, of the said Act provides that after the 31st day of March, 1899, there should be annually paid out of the Consolidated Fund to the Local Taxation (Ireland) Account certain sums therein provided, and sub-section 2 recites that by reason of this section certain grants heretofore made out of the Exchequer in aid of the rates would cease, and enacts that the Lord Lieutenant shall cause to be paid in respect of every local

*Barton, J.* financial year out of the Local Taxation (Ireland) Account at  
 1910. such times and by such payments as he may direct to each county  
 DUBLIN council who satisfy the Lord Lieutenant that they have fulfilled  
 CORPORATION their duty with respect to accommodation and buildings for lunatic  
*v.* poor, and that their lunatic asylum is well managed and in good  
 THE KING. order and condition, and the lunatics therein properly maintained  
 and cared for, sums at the rate for each lunatic in the asylum for  
 whom the net charge upon the council (after deducting any  
 amount received by them for his maintenance from any source  
 other than poor rate) is equal to or exceeds four shillings a week  
 throughout the period of maintenance for which the sum is calcu-  
 lated of one half of such net charge, or four shillings a week,  
 whichever is least.

6. Section 59 of the said Act enacts that all sums directed by the Act to be paid out of the Consolidated Fund should be charged on and paid out of the Consolidated Fund of the United Kingdom, or the growing produce thereof, at such times and by such instalments as the Treasury should direct.

7. The county councils of the city of Dublin, and of the counties of Dublin, Louth, and Wicklow, satisfied the Lord Lieutenant that they fulfilled their duty with respect to the several matters mentioned in section 58, sub-section 2, hereinbefore mentioned, and there were paid to the said county councils through the Local Taxation (Ireland) Account under the provisions of section 58 of the said Act, the full capitation grants out of the several sums set out in the second schedule hereto.

8. Although the liabilities of the said city and counties to the said Joint Committee of the said Richmond Asylum were fully discharged, no sum has ever been paid out of the Local Taxation Account to the said county councils in respect of the first quarter of the year 1899, and the sum due to them out the Local Taxation Account in respect of the said first quarter of the year 1899, is £5193 5s. 9d. The proportion of this sum payable to the Corporation of Dublin is £3059 0s. 1d. The claims for the three months in question were prepared in accordance with the prescribed regulations and duly audited and certified by William Edward Ellis, LL.D., Local Government Board Auditor. No

part of the said sum due to the said county councils has ever been paid to them. The said sums of £5193 5s. 9d. and £3059 0s. 1d. were ascertained and audited by an auditor of the Local Government Board. And your suppliants claim payment of the said sum of £3059 0s. 1d. out of the Local Taxation Account.

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9. The said county councils are British subjects and the subject-matter of this petition arose within that part of the now United Kingdom of Great Britain and Ireland called Ireland.

YOUR SUPPLIANTS THEREFORE HUMBLY PRAY—

That Your Majesty will be graciously pleased to direct that this petition be endorsed with Your Majesty's Fiat. Let right be done.



CIVIL SERVICE ESTIMATES.

| Citation of Appropriation Acts. | Financial Year in which Sums were voted by Parliament. | Class under which Vote appears in the Estimates. | Sums voted by Parliament. |         | Being a contribution in aid of the Maintenance of Pauper Lunatics for | Financial Year in which Grants were paid out. | Appropriation of Sums voted by Parliament.—Civil Service Estimates (Appropriation) Accounts. |       | Period in respect of which Grants were paid. | Unexpended Sums surrendered to Exchequer. |
|---------------------------------|--------------------------------------------------------|--------------------------------------------------|---------------------------|---------|-----------------------------------------------------------------------|-----------------------------------------------|----------------------------------------------------------------------------------------------|-------|----------------------------------------------|-------------------------------------------|
|                                 |                                                        |                                                  | £                         | 55,692  |                                                                       |                                               | £                                                                                            | Nil.  |                                              |                                           |
| 37 & 38 Vict. c. 56             | 1874-5                                                 | II.                                              | —                         | 55,692  | 9 months ended 31st Dec. 1874                                         | —                                             | —                                                                                            | Nil.  | None paid during year.                       | 55,692                                    |
| 38 & 39 Vict. c. 78             | 1875-6                                                 | "                                                | 1,256                     | 56,948  | "                                                                     | 1875-6                                        | 56,948                                                                                       | Nil.  | 9 months ended 31st Dec. 1874                | Nil.                                      |
| 39 & 40 Vict. c. 60             | 1876-7                                                 | "                                                | —                         | 78,000  | Year ended                                                            | 1876-7                                        | 77,907                                                                                       | 93    | Not stated.                                  | 93                                        |
| 39 & 40 Vict. c. 60             | 1876-7                                                 | "                                                | —                         | 81,100  | "                                                                     | 1876-8                                        | 80,380                                                                                       | 719   | "                                            | 719                                       |
| 40 & 41 Vict. c. 61             | 1877-8                                                 | "                                                | —                         | 83,800  | "                                                                     | 1877-8                                        | 82,053                                                                                       | 1,746 | Year ended 31st Dec. 1877                    | 1,746                                     |
| 41 & 42 Vict. c. 65             | 1878-9                                                 | VI.                                              | 82,095                    | 84,811  | "                                                                     | 1878-9                                        | 84,810                                                                                       | —     | "                                            | —                                         |
| 42 & 43 Vict. c. 61             | 1879-80                                                | "                                                | 2,716                     | 86,332  | "                                                                     | 1879-80                                       | 85,841                                                                                       | 491   | "                                            | 491                                       |
| 43 Vict. c. 13                  | 1879-80                                                | "                                                | 60,500                    | 87,922  | "                                                                     | 1880-1                                        | 87,250                                                                                       | 671   | "                                            | 671                                       |
| 43 & 44 Vict. c. 40             | 1880-1                                                 | "                                                | 25,832                    | 90,000  | "                                                                     | 1881-2                                        | 89,424                                                                                       | 575   | "                                            | 575                                       |
| 44 & 45 Vict. c. 56             | 1881-2                                                 | "                                                | —                         | 93,000  | "                                                                     | 1882-3                                        | 92,866                                                                                       | 133   | "                                            | 133                                       |
| 45 & 46 Vict. c. 71             | 1882-3                                                 | "                                                | —                         | 94,500  | "                                                                     | 1883-4                                        | 95,388                                                                                       | 1     | "                                            | 1                                         |
| 46 & 47 Vict. c. 50             | 1883-4                                                 | "                                                | —                         | 890     | "                                                                     | 1884-5                                        | 97,809                                                                                       | 390   | "                                            | 390                                       |
| 47 & 48 Vict. c. 73             | 1884-5                                                 | "                                                | —                         | 98,200  | "                                                                     | 1885-6                                        | 99,608                                                                                       | 191   | Not stated.                                  | 191                                       |
| 48 & 49 Vict. c. 64             | 1885-6                                                 | "                                                | —                         | 99,000  | "                                                                     | 1886-7                                        | 101,800                                                                                      | —     | "                                            | —                                         |
| 49 & 50 Vict. c. 26             | 1886-7                                                 | "                                                | —                         | 800     | "                                                                     | 1887-8                                        | 104,327                                                                                      | 132   | "                                            | 132                                       |
| 50 Vict. c. 1                   | 1886-7                                                 | "                                                | —                         | —       | "                                                                     | 1888-9                                        | 108,671                                                                                      | 333   | "                                            | 333                                       |
| 50 & 51 Vict. c. 50             | 1887-8                                                 | "                                                | —                         | 104,480 | "                                                                     | 1889-90                                       | 112,210                                                                                      | 151   | "                                            | 151                                       |
| 51 & 52 Vict. c. 61             | 1888-9                                                 | "                                                | —                         | 109,005 | "                                                                     | 1890-1                                        | 111,654                                                                                      | 1,459 | "                                            | 1,459                                     |
| 52 & 53 Vict. c. 70             | 1889-90                                                | "                                                | —                         | 112,362 | "                                                                     | 1891-2                                        | 117,213                                                                                      | 737   | "                                            | 737                                       |
| 53 & 54 Vict. c. 72             | 1890-1                                                 | "                                                | —                         | 113,114 | "                                                                     | 1892-3                                        | 120,695                                                                                      | 760   | "                                            | 760                                       |
| 54 & 55 Vict. c. 55             | 1891-2                                                 | "                                                | —                         | 117,213 | "                                                                     | 1893-4                                        | 123,274                                                                                      | 699   | "                                            | 699                                       |
| 55 & 56 Vict. c. 33             | 1892-3                                                 | "                                                | —                         | 121,433 | "                                                                     | 1894-5                                        | 126,266                                                                                      | 719   | "                                            | 719                                       |
| 56 & 57 Vict. c. 60             | 1893-4                                                 | "                                                | —                         | 124,035 | "                                                                     | 1895-6                                        | 130,652                                                                                      | 602   | "                                            | 602                                       |
| 57 & 58 Vict. c. 59             | 1894-5                                                 | "                                                | —                         | 115,000 | "                                                                     | 1896-7                                        | 137,510                                                                                      | —     | "                                            | —                                         |
| 58 & 59 Vict. c. 31             | 1895-6                                                 | "                                                | —                         | 11,966  | "                                                                     | 1897-8                                        | 144,169                                                                                      | —     | "                                            | —                                         |
| 59 Vict. c. 6                   | 1895-6                                                 | "                                                | —                         | 126,966 | "                                                                     | 1898-9                                        | 144,169                                                                                      | —     | "                                            | —                                         |
| 59 & 60 Vict. c. 46             | 1896-7                                                 | "                                                | —                         | 131,372 | "                                                                     | 1899-00                                       | 144,169                                                                                      | —     | "                                            | —                                         |
| 60 & 61 Vict. c. 67             | 1897-8                                                 | "                                                | —                         | 138,113 | "                                                                     | 1900-1                                        | 144,169                                                                                      | —     | "                                            | —                                         |
| 61 & 62 Vict. c. 61             | 1898-9                                                 | "                                                | —                         | 143,653 | "                                                                     | 1901-2                                        | 144,169                                                                                      | —     | "                                            | —                                         |
| 62 & 63 Vict. c. 49             | 1899-00                                                | "                                                | —                         | 517     | "                                                                     | 1902-3                                        | 144,169                                                                                      | —     | "                                            | —                                         |
| 63 & 64 Vict. c. 57             | 1900-1                                                 | VII.                                             | —                         | 37,030  | 3 months ended 31st Mar. 1898                                         | 1900-1                                        | 37,029                                                                                       | —     | Paid into Local Taxation (Ireland) Account.  | —                                         |

\* These dates are obviously incorrect.—See Estimates.

NOTE.—All amounts are given in round numbers; fractions of £1 being excluded.

The SECOND SCHEDULE referred to, containing particulars of Capitation Grants for Pauper Lunatics paid through the Local Taxation (Ireland) Account, under Section 58 (2) (c) of the Local Government (Ireland) Act, 1898.

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| Financial Year in which payments were made. | Sums paid to County Councils. | Period in respect of which calculations were made and sums paid out. | REMARKS.                                                                                                                                                          |
|---------------------------------------------|-------------------------------|----------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1899-1900                                   | £ 153,467                     | Year ended 31st Dec. 1898                                            | A reference to the payments made through the Local Taxation (Ireland) Account will show that no Grant has ever been paid in respect of the first quarter of 1899. |
| 1900-1                                      | 160,282                       | „ „ Mar. 1900                                                        |                                                                                                                                                                   |
| 1901-2                                      | 165,827                       | „ „ „ 1901                                                           | The amounts are stated in round numbers; fractions of £1 being excluded.                                                                                          |
| 1902-3                                      | 171,603                       | „ „ „ 1902                                                           |                                                                                                                                                                   |
| 1903-4                                      | 176,034                       | „ „ „ 1903                                                           |                                                                                                                                                                   |
| 1904-5                                      | 181,765                       | „ „ „ 1904                                                           |                                                                                                                                                                   |
| 1905-6                                      | 180,916                       | „ „ „ 1905                                                           |                                                                                                                                                                   |

The petition of right was duly filed.

The following answer and plea were delivered by the Attorney-General for Ireland for and on behalf of the King:—

The Right Honourable Richard Robert Cherry, His Majesty's Attorney-General for Ireland, on behalf of Our said Lord the King, gives the Court to understand and be informed as follows:—

1. That the sum of £37,030 voted by Parliament by the statute 63 & 64 Vict. c. 57, referred to in schedule I attached to the Petition of Right, was not voted as a contribution in aid of the maintenance of pauper lunatics in Ireland, as alleged, but was voted as a contribution to the Local Taxation (Ireland) Account.

No sum is due to the County Councils of the City of Dublin, and of the counties of Dublin, Louth, and Wicklow in respect of

*Barton, J.* the first quarter of the year 1899, as is alleged in paragraph 8 of  
 1910. the Petition of Right, and no sum is due or payable to the Cor-  
 DUBLIN poration of Dublin, as alleged in the said paragraph.

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3. All sums payable to the said Councils or to the Corporation of Dublin in virtue of the Local Government (Ireland) Act, 1898, section 58, sub-section 2, were duly paid prior to the date of the petition herein, and no sum voted by Parliament as a grant in aid of the local cost of maintenance of pauper lunatics in Ireland has been withheld in respect of the first quarter of the year 1899, or at all.

4. The Attorney-General begs to refer to the certificates of audit referred to in paragraph 8 of the Petition, when produced.

5. The Attorney-General submits that in point of law the petitioners are not entitled to any part of the relief claimed in the petition.

6. The Attorney-General submits that the claim set forth in the petition of right is not a proper subject-matter of petition of right, that the petition of right therefore does not lie, and accordingly the same ought to be dismissed.

The suppliants joined issue.

*Serjeant O'Brien, K.C., and Clancy, K.C. (with them Ronan, K.C., and P. A. O'C. White), for the suppliants.*

*The Attorney-General (The Right Hon. Redmond J. Barry, K.C.) and the Solicitor-General (Charles A. O'Connor, K.C.) (with them Dudley White, K.C., and Linehan), for the Crown.*

The facts and documents, the statutes and orders relating to the controversy, and the questions argued by counsel, are exhaustively dealt with in the judgments of Barton, J., and of the Lord Chief Baron.

March 11. BARTON, J. :—

This is a petition of right. The suppliants are the Lord Mayor, Aldermen, and Burgesses of the City of Dublin, who constitute the Council of the County Borough of Dublin. The petitioners seek for a declaration that they are entitled to be paid the sum of £3059 0s. 1d. out of a specific part of the

Local Taxation (Ireland) Account. This sum represents the petitioners' proportion of the grant in aid, which, as they submit, should have been paid to them under section 58 of the Local Government (Ireland) Act, 1898, for the cost of maintenance of pauper lunatics in the Richmond Lunatic Asylum during the first quarter of the year 1899.

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The questions which have been discussed at the Bar may be conveniently considered under five heads. 1. As a matter of fact, was the first quarter of 1899 skipped, so far as this grant in aid was concerned? 2. If so, was a statutory obligation imposed by section 58 of the Local Government Act upon the Local Taxation (Ireland) Account to pay the grant in aid to the petitioners in or for that quarter? 3. Were all conditions fulfilled to entitle the petitioners to be paid the grant for that quarter? 4. Have the petitioners lost their right (if any) by laches or delay? and (5) Does petition of right lie in this case?

The first question is a question of fact—whether, as a matter of fact, this grant in aid of the maintenance of pauper lunatics in Ireland was ever paid from any source in or for the first quarter of 1899?

It may seem strange that there should be any difficulty in answering such a simple question. But it has been the subject of controversy between the Irish Government and the local authorities for more than ten years. The difficulty arises from the different periods of time which had to be considered for the purposes of receipt, expenditure, and accounting, and from the fact that a change was made in those periods by the Local Government Act of 1898. From 1875 to 1898, the grant in aid was annually voted and appropriated by Parliament in the course of the Exchequer financial year, which was a year commencing April 1st, and ending March 31st. The grant was paid to the Irish local authorities in the current Irish financial year, and was calculated upon, and—as will appear—was paid in respect of, the cost of maintenance during the preceding Irish financial year. The Irish financial year was a calendar year commencing on January 1st, and ending on December 31st. The Local Government (Ireland) Act, 1898, assimilated the Irish local financial year to the Exchequer



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financial year, so that from and after "the appointed day," April 1st, 1899, the Irish local financial year was no longer the calendar year, but the year commencing April 1st and ending March 31st. The last Irish local financial year (old style) ended on December 31st, 1898, and the first Irish local financial year (new style) commenced on April 1st, 1899. This left a gap of three months. The first quarter of 1899 did not form part of any local financial year in Ireland. It is obvious that, in this maze of overlapping and changing periods of time, the first quarter of 1899 was in danger of being skipped. The preliminary question in this case is—was it skipped?

It is worth noting—because it has contributed to some extent to cause the misunderstanding—that the expressions "in aid of" and "Grant in Aid" occur in documents and correspondence in two different connexions. The grant is spoken of sometimes as a grant "in aid of the rates," sometimes as a grant "in aid of" the cost of maintenance. Neither phrase was incorrect. The course of events—as will appear—was this. The county rates bore the burden of the cost of maintenance. The Treasury and Parliament refused to give their contribution in aid of the cost of maintenance until the cost of maintenance had been duly audited and certified. The result was that the local authorities did not receive the contribution, and the rates were not in fact aided until the year after the cost had been defrayed. The indiscriminate use of such expressions as "in respect of" has also facilitated misunderstanding. Sometimes the grant is spoken of as being paid "in respect of" a current period, and refers to the year of payment, and more often as being paid "in respect of" a past period, and refers to the year of maintenance. It was, in a sense, paid "in respect of" both periods.

For the purpose of clearing up the questions which are in controversy, the Crown has placed at the disposal of the petitioners all the materials at their disposal with reference to the history of the grant. Counsel for the Crown properly object to the use of these materials for the purpose of construing the Local Government Act; but I do not understand them to object to their use for the purpose of ascertaining this question of fact, which stands at the threshold of the case. With the help of these materials I



propose to trace, as concisely as I can, the history of the grant, so far as may be necessary for the purpose of answering this preliminary question.

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The first grant in aid of the cost of maintenance of pauper lunatics in Ireland was voted and appropriated by Parliament in the Exchequer financial year 1874-5, but had to be surrendered at the end of the year as an unexpended balance. It was re-voted and re-appropriated by Parliament in the Exchequer year 1875-6; and the reason for its surrender was explained in more than one official document. It will suffice to quote the following official note which accompanied the estimates presented to Parliament in the Exchequer year 1875-6: "The accounts of Irish district lunatic asylums are required by 31 & 32 Vict. c. 97, sections 5 and 6, to be made up annually to 31st December, and to be audited by the poor law auditors for the unions as soon as can be after the 25th March. Since, therefore, the Government contribution can only be paid upon return of the number and cost of pauper lunatics certified by the auditors, *no payment in respect of any period later than December 31st, 1874, will be made during 1875-6.*" Accordingly the grant-in-aid started in this way. It was voted and appropriated in the Exchequer year 1875-6. It was paid to the Irish local authorities in the calendar year 1875, in respect of the cost of maintenance in the calendar year 1874.

This course was pursued year by year, down to the passing of the Local Government (Ireland) Act, 1898. Year by year the grant-in-aid was voted and appropriated by Parliament in the Exchequer financial year, and was paid to the Irish local authorities in the current calendar year, in respect of the cost of maintenance of the preceding calendar year.

The last of the Parliamentary grants-in-aid was voted and appropriated in the Exchequer financial year 1898-9; and was paid to the Irish local authorities in the course of the calendar year ending 31st December, 1898. There can be no doubt that it was paid in respect of the cost of maintenance in the year 1897. It is enough to cite three pieces of official testimony. (1) The Treasury circular regulating the grant in aid, which was issued on 15th February, 1898, provided for the furnishing of the

*Barton, J.* claims for the grant by the local bodies for the grant in 1898, 1910. and referred to it as being "in respect of the year 1897." (2) The estimates for the grant which were presented and voted by Parliament in the Exchequer year 1898-9 were accompanied by an explanatory note which was as follows:—"Pauper lunatics—contribution in aid of maintenance in district asylums during the year ended 31st December, 1897, at the maximum rate of 4s. per head per week." (3) The Secretary to the Treasury, in answer to a question in Parliament (Hansard April, 30, 1900), said—"The last payment from voted moneys was in respect of the calendar year 1897."

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The next stage in the history of the grant was the passing of the Local Government (Ireland) Act, 1898. That Act made several changes which directly or indirectly affected the grant in aid. It transferred (from 16th May, 1899) the management of asylums from Boards of Governors to Committees of County Councils (s. 9 and Local Government Board Order of 16th March, 1899); it made the grant in aid a charge upon a specific portion of the Local Taxation (Ireland) Account (section 58); and it changed the local financial year in Ireland from a calendar year to a year commencing April 1st and ending March 31st. This change was to commence from April 1st, 1899 (sections 109 and 124).

The first grant in aid from the Local Taxation Account was paid to the local authorities in the financial year (new style) commencing the 1st April, 1899. The last grant from voted moneys had been paid in the financial year (old style), ending December 31st, 1898. It is not, and could not be, suggested that the interval formed a part of any financial year or other period in which the rates were aided. Accordingly, it is clear that the first quarter of 1899 was skipped, and did not form part of any period in which a grant was paid in aid of the rates. The rates were imposed and collected in and for that quarter, but no grant was received in aid of those rates.

If it did not form part of any period in which the rates were directly aided, did the first quarter of 1899 form part of any period in respect of the cost of maintenance in which the rates were subsequently aided? The answer to this question must also be in the negative. The first grant in aid, after the coming into

force of the Local Government Act, from the Local Taxation Account was paid into the local financial year (new style) commencing April 1st, 1899, in respect of the cost of maintenance in the calendar year 1898. The next grant in aid from the Local Taxation Account was paid in the local financial year (new style), commencing 1st April, 1900, in respect of the cost of maintenance in the preceding local financial year (new style), commencing 1st April, 1899. Here again the first quarter of 1899 was skipped. The lunatics and the asylums were maintained during the first quarter of 1899. The cost was incurred, and the accounts were audited and certified by Government auditors. But no grant was ever paid in respect of the cost of maintenance during that period.

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Accordingly, it is abundantly clear that the first quarter of 1899 was skipped both ways. It neither formed part of any period in which the rates were directly aided by the grant, nor of any period of maintenance in respect of the cost of which any grant was subsequently paid.

The answer given by the Irish Government to the local authorities in 1899 and 1900, when they applied for the grant for the missing quarter, and complained of not receiving it, was contained in letters of the Assistant Under Secretary of 18th November, 1899, and of the 2nd November, 1900.

In the first place, it was said that the grant was not paid in respect of past expenditure, but merely measured by a period of past expenditure, and that it was immaterial to the local authorities what period was taken, or whether any period of maintenance was skipped or not. This view of the grant has been shown from the official documents which have been put in evidence to be, historically and in point of fact, a mistaken one. Besides, it has been shown that not only was there no grant in respect of the cost of maintenance of this quarter, but the rates for this particular quarter were never aided.

The same answer was put in another form. It was said that a year's grant had been made either by Parliament or the Local Taxation Account every year about the same time of the year, and that the local bodies had, therefore, no grievance. But this suggestion that, if a creditor pays an annual sum every year

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at the same time, his debtor has no concern with the period to which the payment is to be applicable, has something about it which is refreshingly quaint and surprising. A person may pay money at the same time every year, and, if he is able from time to time to skip a quarter of the period of his annual liability, he will gain a proportionate advantage over his creditor. He will be credited for his payment up to a date three months later than he otherwise would be. His payment will discharge him from any claim in respect of three months, in respect of which he would otherwise remain undischarged. I am under the impression that the question of fact was not seriously disputed at the close of the argument. The best excuse that can be offered for those who made the mistake is afforded by the circumstance that it took five days' inquiry and argument in this Court before the question was satisfactorily cleared up.

The legal questions which have been argued at the Bar have been whether there was any legal liability on the Local Taxation Account to pay that quarter's rate in aid; and, if so, whether all necessary formalities and conditions were satisfied; and finally, whether a petition of right lies in a case of this kind. It is, however, worth observing that these law points were—as far as I can ascertain—made for the first time during the hearing of this petition. Hitherto, the question at issue between the Irish Government and the local authorities was the question of fact only, namely, the question whether the grant had or had not been received by the local authorities in respect of this missing quarter.

This brings me to the questions of law which were raised at the Bar.

The first question of law is, whether section 58 of the Local Government Act imposed a liability upon the Local Taxation Account to pay the rate in aid applicable to the first quarter of 1899. I am of opinion that upon the true construction of the section the Lord Lieutenant was under an obligation to pay in the first local financial year (new style) all the grant-in-aid left unpaid since the cesser of the annual Parliamentary grant.

Section 58 in sub-section (1) created a fund, to be derived from certain annual payments from the Consolidated Fund, for the



purpose of discharging the liabilities to be imposed by the section. In sub-section (2) there was imposed upon the Lord Lieutenant the duty of causing certain payments to be made out of that fund. He was to pay them in respect of—which in this context means, I think, in aid of the rates of—every local financial year. In sub-section (2) (c) this grant-in-aid for the maintenance of pauper lunatics was specified as one of the payments which the Lord Lieutenant was to make out of the fund to County Councils who satisfied him that they had fulfilled their duty in regard to their lunatic asylum and the patients therein.

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There are several indications in the section that it was contemplated that the obligations which the fund has to bear shall include past obligations. In the first place, the fund itself was to consist of two sums to be annually paid out of the Consolidated Fund. One was a sum (about £200,000) equal to certain licence duties collected in Ireland since the previous 1st April, 1898; and the other was a sum of £79,000 which, being payable to the Local Taxation Account from and after 1st April, 1899, would, or at all events might, in the ordinary course, be payable from Revenue previously collected or received. Secondly, the Lord Lieutenant before paying the grant, which was to become payable on and after 1st April, 1899, had to be satisfied that the County Councils had discharged their duties of management and maintenance for a period which, though undefined by the section, must be a past period. Thirdly, the grant was to be paid at a rate per lunatic calculated on the weekly cost of maintenance for a period of maintenance which, although undefined, must obviously be a past one.

These provisions all suggest that the section, although it was only to come into operation on 1st April, 1899, contemplated continuity and liability for past expenditure. But the matter is made clear, and the past period is defined, by the remarkable words of preamble or recital which precede the direction to the Lord Lieutenant to pay the sums payable under the section to the County Councils. Those words are:—"Whereas by reason of this section certain grants heretofore made out of the Exchequer shall cease, the Lord Lieutenant shall cause to be paid," &c. It is unusual to find a recital of that kind inserted in the middle of a



*Barton, J.* section of a statute, for the purpose of explaining the reason for  
 1910. imposing a statutory duty. The statute directs the Lord Lieutenant  
 DUBLIN to make an annual payment after a certain date, because the  
 CORPORATION to Exchequer grant for the same purpose will cease. That direction  
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 Lord Lieutenant were to be in lieu of and in succession to the  
 former Exchequer payments, and were to commence when the  
 Exchequer payments ceased.

It was, in my opinion, the statutory duty of the Lord Lieutenant to ascertain what was the last payment from the previous Exchequer grants, and what period it covered, and to pay the grant from the hour when the Exchequer grant ceased. That was the view of the Lord Lieutenant at the time. In a letter written by his direction on 2nd November, 1900, it was stated that the Local Taxation Account became liable for the grant-in-aid from January, 1899. The Lord Lieutenant had at his disposal ample materials for ascertaining when the Exchequer grant ceased. For example, the Treasury circular of 15th February, 1898, which was issued for the regulation of the grant in the last year in which the Exchequer grant was paid, was in his office of Lunatic Asylums, Dublin Castle, and showed that the last Exchequer grant was to be claimed and paid in respect of the year 1897. The contention which was raised at the hearing of the petition that section 58 had no retrospective effect, seems to be quite inconsistent with the attitude of the Irish Government in 1899-1900. If it was not retrospective, why did the Lord Lieutenant pay the grant in respect of the year 1898? The claim was, as a matter of fact, sent to the Lord Lieutenant in accordance with the Treasury regulations for the year 1898, and he paid it. Some protests were raised by some of the local authorities at the Local Taxation Account having to bear the charge for the fifteen months from 1st January, 1898, to 31st March, 1899. The Treasury recognized that this was unfair, because the income of the Local Taxation Account only commenced to accrue from 1st April, 1898. [See answer of the Secretary of the Treasury, Hansard, 30th April, 1900.] Parliament came to the rescue and recouped the Local Taxation Account for the first quarter of 1898. This recoupment was made upon the assumption that the Local Taxation Account would bear its own

burden of the grant from the time when its income began to accrue—in other words, that it would bear the twelve months' burden from 1st April, 1898, to 31st March, 1899. But the Local Taxation Account did nothing of the kind. It took its recoupment for the first quarter of 1898, but never paid any grant for the first quarter of 1899, thus only bearing the burden of nine months' grant in respect of its first financial year; and it has thus escaped up to the present the payment of the grant for the first quarter of 1899. If the Local Taxation Account was not liable for the first quarter of 1899, how can the payment of the preceding three quarters of 1898 be justified? and *per contra* I am at a loss to understand why, if the Local Taxation Account was liable for nine months from 1st April to 31st December, 1898, it was not liable for the three months from 1st January to 31st March, 1899. I have no doubt that the obligation to pay the grant-in-aid in respect of the cost of maintenance in that quarter was, by section 58, thrown upon the Local Taxation Account, and that it should have been paid in the financial year 1899–1900.

The next question is whether all necessary conditions were satisfied. It was necessary under the Lunatic Asylum (Ireland) Accounts Audit Act, 1868, and the Treasury Grant Regulations dated 15th February, 1898, which remained in force until cancelled by the Treasury Circular of the 19th March, 1900, that a return of the number and cost of maintenance of pauper lunatics in the asylum should be audited and certified in a prescribed form, and that a claim should be sent forward supported by the prescribed certificates. This Act of Parliament and these regulations and forms were all framed in reference to the calendar year, and were not applicable to a broken period such as the first quarter of 1899. This technical difficulty was obviated by the 40th and 42nd Articles of the Application of Enactments Order. The latter Article provided for complete continuity in the proceedings of the old and new asylum authorities. The former Article provided that the accounts of all receipts and expenditure before the appointed day (1st April, 1899) should be audited, and all consequential proceedings should be had in like manner as nearly as may be as if the Act had not passed, but as soon as practicable after the appointed day; and that for the purpose

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of such audit any authority or officer whose duty it was to make up such accounts, should, until the audit, continue in office with the same duties and liability as before the appointed day. The Local Government Board, who seem to have taken the right view of the matter from the start, acted on that Article. In pursuance of that Article the inspectors of lunatics, acting under the advice of the Local Government Board, directed the asylum authorities to prepare and furnish a special return and abstract of accounts for the first quarter of 1889, so that they might be audited and certified in accordance with the existing regulations. [See letters from the inspectors of lunatics to the Resident Medical Superintendent of Richmond Lunatic Asylum, dated March 22nd, April 13th, and July 13th, 1899.] Mr. Newell, Local Government Board Auditor, carried out the statutory audit of the accounts of this broken quarter, and Dr. Ellis, Local Government Board Auditor, certified the claim for the grant in respect of this quarter in accordance with the Treasury Regulations. The preparation and furnishing of the claim were delayed; but this was in consequence of an official communication from the Castle to the effect that the "capitation claims would not be prepared until further instructions are issued." The certificate given by Dr. Ellis is in evidence, and is as follows:—"Having carefully examined the foregoing returns, I certify that it has been prepared in strict accordance with the instructions contained in the Government Circular of the 15th February, 1898, and that the Council of the County Borough of Dublin is entitled to an amount of £3057 0s. 1d. in respect of the capitation grant for lunatics maintained in the asylum during the quarter ending the 31st March, 1899." In this way, continuity of procedure was, with the help of Articles 40 and 42 of the Application of Enactments Order, secured, and all the statutory and other requirements were complied with in respect of this broken quarter. As regards the conditions required by section 58, it is admitted that the Lord Lieutenant was satisfied on the 1st April, 1899, with respect to the accommodation buildings, management and maintenance of the asylum, and the other matters mentioned in section 58. He must have been so, because he paid in 1899 under this section the grant in respect of the previous period of 1898.

Some reference was made to the delay in bringing this petition. After the petitioners' claim had been refused in November, 1900, they appear to have remained quiescent until January, 1906. But the Crown have not pleaded laches; and they were right in not doing so. The petitioners were met in November, 1900, by an answer which I hold to have been mistaken in fact and unsustainable in law. They had no means of checking the answer which they received. It has been remarked that there was a statutory obligation imposed upon the Crown by section 59 of the Local Government Act to lay before Parliament an annual return of the accounts of the Local Taxation Account; but this does not appear to have been done until after the 31st March, 1906. The petitioners say that they did not become aware until 1906 of the true state of the facts. When they ascertained it, they did not lose time in pressing their claim; and after other modes of pressure failed, they brought this Petition. They have not, in my opinion, forfeited their rights by delay.

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The question remains whether Petition of Right lies in a case of this kind. The grant in aid from 1875 to 1898 was a supply service, which was annually voted and appropriated by Parliament. There can be no doubt that Petition of Right was not maintainable, so long as the grant rested on that basis. The grant was one which Parliament might in any year have lawfully discontinued. The Appropriation Acts prevented the Crown from applying the grants to any purpose but the one to which they were appropriated; but they did not impose any legal obligation on the Crown which this Court could enforce. The Local Government Act changed the character of the grant. Section 58 of the Local Government Act provided for an annual grant of moneys from the consolidated fund to the Local Taxation (Ireland) Account, and imposed a statutory obligation upon the Lord Lieutenant, out of the moneys so granted, to cause certain sums or a rateable proportion thereof to be annually paid to each County Council, which should satisfy certain conditions. When those conditions are satisfied, the moneys payable under the section become in equity the moneys of the County Councils. The Lord Lieutenant has no discretion in the matter, save as to the time at which and instalments by which he may direct the



*Barton, J.* payment to be made. I find that the proper moneys of the  
 1910. petitioners were withheld by the Crown under a mistake of fact,  
 DUBLIN and remain in the hands of the Crown. I respectfully adopt the  
 CORPORATION view expressed by the Lord Chief Baron in *Kildare County Council v.*  
*v.* *The King*. (1), that Petition of Right lies in the case of grants made  
 THE KING. by or on behalf of the Crown, and none the less when the grant  
 is with the assent of Parliament. The Lord Chief Baron quoted  
 passages from Lord Somers' judgment in *The Bankers' Case* (2) and  
 from Erle, C.J.'s, judgment in *Tobin v. The Queen* (3) which were  
 to the effect that Petition of Right lay in the case of "grants" as  
 well as contracts. This seems to be more an *a fortiori* case than  
 the Kildare County Council case; and I see no reason to doubt  
 that a petition of right lies.

For all these reasons I am of opinion that the petitioners have  
 established their right to a declaration to the effect that they are  
 entitled to be paid the sum of £3089 0s. 10d. out of moneys paid  
 to the Local Taxation (Ireland) Account under section 58 of the  
 Local Government (Ireland) Act, 1898, subject to the conditions  
 therein contained and provided. There will be liberty to apply.

W. M'G.

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 1910. *The Attorney-General* and *The Solicitor-General* (with them  
 Oct. 31. *Dudley White, K.C.*, and *J. Linehan*) for the Crown.  
 Nov. 1.

*Serjeant O'Brien, K.C.*, and *Ronan, K.C.* (with them *Clancy, K.C.*,  
 and *P. A. O'C. White*), for the suppliants.

Dec. 12. The judgment of the Court was delivered by the LORD CHIEF  
 BARON.

By sub-section 1 of section 58 of the Local Government  
 (Ireland) Act, 1898, 61 & 62 Vict. c. 37, it is enacted that:—

"After the 31st March, next after the passing of this Act,"  
 (i.e., after the 31st March, 1899), "there shall be annually paid

(1) [1909] 2 I. R. 199, 227-232.

(2) 14 State Trials, 83.

(3) 16 C. B. (N. S.), 310.

(4) In the Court of Appeal before THE LORD CHANCELLOR, THE LORD  
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out of the Consolidated Fund to the Local Taxation (Ireland) Account, *inter alia* (a), a sum equal to the amount of the duties ascertained to be the proceeds in *the previous financial year*" of the duties collected in Ireland on certain local taxation licences.

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And by sub-section 2, after reciting that, by reason of this section, certain grants theretofore made out of the Exchequer in aid of the rates will cease, it is enacted that the Lord Lieutenant shall cause to be paid, in respect of every local financial year, out of this Local Taxation (Ireland) Account, certain annual sums, of which one (particularized in clause (e) of the sub-section) is to each County Council who satisfies the Lord Lieutenant of certain matters, of sums at a rate (which may be taken to be four shillings per head per week) for each lunatic in their lunatic asylum, if that asylum answers a certain description mentioned in the sub-section.

Under this enactment, the first yearly gale of this annual payment to the Local Taxation Account was made in the financial year 1899-1900; and its amount was that of the specified duties which were collected in Ireland in the previous financial year, *i.e.*, 1898-1899.

Parliament had been in the habit, for upwards of twenty years before the passing of this Act, of providing by the Appropriation Act of each year an annual capitation grant in aid of the local rates for pauper lunatics in Ireland; and this was one of the grants which the section states was, by reason of it, to cease.

Under section 5 of the Lunatic Asylums (Ireland) Accounts Audit Act, 1868, 31 & 32 Vict. c. 97, the accounts of the asylums were made up for the calendar year as distinguished from the financial year; and consequently the grant made during each financial year was for the maintenance of the lunatics during the calendar year which had ended prior to the commencement of the financial year in which it was made. The last of these annual grants was made by the Appropriation Act of 1898, 61 & 62 Vict. c. 61. It is described in Schedule B to that Act, Part II., under Civil Services, Class VI., No. 4—"For a grant in aid of the local cost of maintenance of pauper lunatics in Ireland, £143,653."

The estimate for this sum gives the details of it in the following words: "Contribution in aid of maintenance in district

*Appeal.*    asylums during the year ended the 31st December, 1897, at a  
 1910.    maximum rate of 4s. per head per week, £143,653.”

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 THE KING.    This sum was ascertained by the accounts of the asylums  
 audited under the Act of 1868—accounts which mention, *nomina-*  
*tim*, every pauper lunatic in aid of whose maintenance the grant  
 is made, and the number of weeks in that year during which he  
 was in the asylum.

Thus there was a gap of three months, from the 31st December, 1897 (to which date this capitation grant for the maintenance of pauper lunatics was provided by the Appropriation Act of 1898), and the 31st March, 1898 (the commencement of the first of the years described in sub-section 2 of section 58 as “the *previous* financial year”). Neither the Appropriation Act of 1898 nor the Local Government Act of the same year provided any capitation grant in aid of the local rates for the maintenance of pauper lunatics during this gap of three months.

It is hardly to be believed that a matter so clear as the existence of this gap could have been the subject of controversy between the local authorities and the Executive Government for some years; but it is beyond controversy that is the fact. However, in the year 1901, the Executive Government appear to have been convinced of the fact; and during the session of that year an estimate for £37,030 was submitted to Parliament as a contribution to the Local Taxation (Ireland) Account.

The estimate explains the necessity of the grant of this sum, as follows:—

“This contribution is required to recoup to the Local Taxation (Ireland) Account the expenditure met under that account for pauper lunatic grants in respect of the period from the 1st January to the 31st March, 1898. The last Parliamentary vote for pauper lunatic grants, that of the year 1898–99, was applicable to the cost of maintenance in the year ended the 31st December, 1897. The subsequent grants in aid of maintenance became, under section 58 of the Local Government Act, 1898, a charge upon the income of the Local Taxation Account. The first Exchequer contribution to that Account to provide for the pauper lunatic grants and other transferred charges included the proceeds of the local taxation licences in Ireland during the year beginning the

1st April, 1898. Consequently as regards the period from the 1st January to the 31st March, 1898, the Local Taxation Account bore the charge for pauper lunatics although the revenue applicable to that charge had not begun to accrue to the Account. The grants paid in respect of that period amounted to £37,029 16s. 6d.; and this vote is proposed to enable that amount to be paid to the Local Taxation Account *as if it were a payment under section 58 of the Local Government (Ireland) Act, 1898.*"

This estimate was adopted by Parliament. Its amount, £37,030, was included in the Appropriation Act of that year, and was paid into the Local Taxation (Ireland) Account.

Thus Parliament provided, out of Imperial moneys, the amount of the capitation tax for maintenance of pauper lunatics up to the 31st March, 1898, upon the basis that the effect of the Local Government Act was *merely to transfer* the charge for pauper lunatics from one account to another; and that the subsequent grants in aid of maintenance became under the Act of 1898 a charge on the income of the Local Taxation (Ireland) Account. Parliament thus clearly evidenced its intention that any change which might be effected under that Act of the accounting period to which I shall just now advert should not, as between Imperial funds and local rates, involve any loss to the latter. This would have been incontestably clear, had the £37,030 been included in the Appropriation Act of 1898, instead of in that of 1900; and the accident of the date cannot make any difference. The grant made by the Appropriation Act of 1900 was to rectify an omission in that of 1898, and it is expressly given *as if* it were a payment under section 58 of the latter Act. It must therefore have effect *as if* passed at the earlier date.

I now proceed to the action, after the passing of the Act of 1898, of those who had the control of the Local Taxation (Ireland) Account.

In the year 1899, the duties which had been collected in Ireland on the specified local taxation licences in the financial year 1889-9 were paid into the Local Taxation Account; and there was paid thereout one year's capitation grant, *i.e.* that for the maintenance of the lunatics from the 31st December, 1897, to 31st December, 1898. This appears to me to have been quite

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regular, as the Order under the Local Government Act, which practically repealed section 5 of the Act of 1868, had not operation in respect to the grant for that period.

When we come, however, to the grant for the next financial year, *viz.* 1899-1900, it is admitted that the Local Government (Application of Enactments) Order, 1898, Article 19, and the Asylums Account Order, 1899, applied, and rendered it necessary that the accounts of the receipts and payments of the county councils for maintenance of pauper lunatics (being the accounts on the basis of which the capitation grant from the Local Taxation Account was to be made) should be made up to the 31st March in each year, instead of the 31st of December, as theretofore. As the last previous payment had been for maintenance up only to the 31st December, 1898, it followed that the period for which the capitation grant had not been paid was not one year only, but one year and a quarter.

The advisers of the Irish Government appear to have been pressed by two considerations: first, that the accounts should extend to the end of the financial year—which was undoubtedly correct; secondly, that the payment was to be “in respect of every local financial year”—words which in the Local Government Act are equivalent to “every financial year”; and, accordingly, they adopted that which, to my mind, was a strange course—they left out of consideration the sums paid by the Corporation for maintenance of pauper lunatics during the quarter from 31st December, 1898, to 31st March, 1899, and paid only the capitation grant from the latter date to the 31st March, 1900.

This would have been, in my opinion, for the reasons I shall later on shortly give, an erroneous course, even had the Act of 1900 not been subsequently passed. But even had this course been right at the time, I am of opinion that when the Act of 1901 was passed, His Excellency the Lord Lieutenant, in administering the Local Taxation Fund, should have been advised to apply the £37,030 received under that Act to recoup that fund the payment thereof of the maintenance during the quarter specified in the estimate, *viz.* 1st January to 31st March, 1898. This would involve the payments made in the first year out of the Local



Taxation Account being treated as, and being in fact, payments for maintenance during three quarters only of the year, viz., from 31st March, 1898, to 1st January, 1899; and the sum which had been paid for the first quarter of 1898 should then have been deemed to remain to the credit of the Local Taxation Account, and to be applicable to discharge *pro tanto* the unpaid first quarter of 1899. This might require some small adjustment of the grant payable in respect of each of those two different quarters, if the grant for the first quarter of 1898, which was recouped out of Imperial taxation, varied in amount from that for the first quarter of 1899, which had not been paid at all.

Putting, however, matters of form and small discrepancies out of consideration, the substance of the matter seems to me to stand thus. The transfer of the pauper lunatics' capitation account (which was an account between Imperial and local funds) from the Annual Votes and the Appropriation Acts to the Local Taxation Account involved a change of one quarter of a year in the date to which the accounts should be made up, and consequently the necessity of a provision, in some one year, of the grant, not for a year alone, but for a year and a quarter. As between Imperial and local funds the change occurred in the year 1898; but as between the Local Taxation Account and the local authorities, the county councils, the deferred operation of the Orders under the Local Government Act prevented the change taking effect till 1899. Still, however, the change in the two sets of accounts was the same one change accruing from the same cause. As between Imperial and local funds, Parliament, in 1901, determined that the money provision incident to this change in the form of the accounts should come out of Imperial, in exoneration of Local funds; and provided those funds accordingly. It made this provision, not merely as between Imperial funds and the local Taxation Account—for this account was merely the machinery by which Imperial funds were conveyed to the local authorities—but for the substantive benefit of the local authorities themselves. Notwithstanding this, the local funds have not received the benefit intended by the Legislature. They have not received any capitation grant for a quarter of a year which Parliament intended they should receive, and that grant has been inter-

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cepted by something called an "Account," which *quoad* this matter should be deemed to be in the nature of a conduit pipe of Imperial funds to the local authorities.

Thus, irrespective of the construction of section 58 of the Act of 1898, I am of opinion, having regard to the Act of 1900, and the estimate I have referred to, that the suppliants are entitled to succeed, subject possibly to some small variation in amount.

I am, however, further, of opinion that, on the true construction of the Local Government Act alone, the suppliants, even had the Act of 1900 not contained the grant of the £37,030, would have been entitled to succeed; and viewed in this light, their claim is not even subject to the small variation I have referred to.

Before I approach the words of section 58, I desire to say one word as to the general character of the Act of which it forms part. The work which it was its object to effect (and which I have more than once said it in my opinion did effect with marvellous accuracy) was one of great complexity, one which necessarily involved, not only the application of many great principles, but a vast mass of detail. Not only was it necessary that the existing duties and powers of evanescent bodies should be transferred to newly created corporations, and the machinery which regulated the relations between the former bodies and outside authorities adapted to the altered conditions under which local government was thenceforth to be carried on, but many additional powers had to be conferred, many new duties imposed, on the new bodies. The only convenient mode of effecting this was by the adaptation, with necessary alterations, of many existing statutes, some of them previously relating to England only. This task of adaptation was wholly beyond the ability of Parliament to accomplish in a single Session. Great powers were, accordingly, delegated to certain bodies in Ireland—notably the Lord Lieutenant in Council, and the Local Government Board—who thus became possessed (subject to disallowance by either House of Parliament) of powers which were legislative in their nature, and the execution of which by these outside bodies, unless disaffirmed by Parliament, was to be deemed to be part of the Act.

Substantive provisions in such an Act must be so read that rights of parties under them cannot be defeated or affected by the exercise of those powers. One of the matters as to which the existing law was changed by the exercise of these powers was, as I have already stated, the date up to which the accounts of lunatic asylums should be made up. The former date of the 31st December was changed to the 31st of March. This change cannot be allowed to injuriously affect the rights of county councils under the substantive provisions of section 58.

Now sub-section 2 of that section clearly shows that the relation of cause and effect exists between the cesser of certain former Parliamentary grants in aid of rates and the payment to each county council of the sums mentioned in that sub-section. By looking outside the Act, we ascertain from the statute book that there has been a long succession, absolutely uninterrupted, of annual grants from Imperial funds, at a specified and fixed rate, in aid of the local expenditure on the maintenance of pauper lunatics; and we are told by this sub-section that by reason of it, "by reason of this section"—a section which provides a future perpetual succession of the same annual grants from Imperial funds, of the same character, at the same fixed rate, in aid of the continuing local expenditure for the same purpose—this long succession of grants is to cease. I think that the *prima facie* inference is that the new provision is to be in continuation of, and in immediate succession to, the former; and if anything be required to strengthen this inference, it is in my opinion to be found in one of the principal objects of the section being to interpose "the Local Taxation Account" between the Imperial authorities and the local bodies, so that the payments should be made thenceforward through that "Account" instead of as theretofore direct by the one body to the other.

Are there any words to rebut this *prima facie* inference? I cannot find any. Those relied on are "in respect of each local financial year"—an expression which is defined by section 109 to mean "the twelve months ending the 31st day of March."

Had there been no change effected as to the date to which the accounts were to be made up under section 5 of the Act 31 & 32 Vict. c. 97, in each local financial year, a year's capitation grant

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would have been paid up to the 31st December previously, notwithstanding this definition. By the change of date the payment in each financial year must be of a year's capitation grant up to the last day of the previous financial year. But this change involves that, in the year in which the change is made, there is necessarily the maintenance for another quarter of a year to be provided for; and in favour of the clear intention that the payment is to be in substitution for and in succession to the former grant, I have no hesitation in holding that "local financial year" is accessory only, and must yield to general intention, by being read in reference to the year in which the change is made "in every local financial year or *part of a year*."

The remaining question is, whether petition of right is an apt remedy for enforcing the right of the suppliants?

Upon the general question whether a petition of right lies to recover a sum of money granted by Act of Parliament to a specified person, natural or corporate, which sum of money remains in the hands of servants of His Majesty, I have nothing to add to what I expressed, at I fear too great length, in *The Kildare County Council v. The King* (1). There is, however, a distinction between that case and the present. The subject-matter of the petition there was a sum of money which, according to the suppliants' case, still remained in the Consolidated Fund. In the present case, every sum which, under section 58, ought to have been paid out of that fund into the Local Taxation (Ireland) Account has been so paid. The question, therefore, is whether the money standing to the credit of that account remains money in the possession of the Crown?

I am of opinion that it does. Under section 58, sub-section 2, of the Act, that money is subject to the control of the Lord Lieutenant, who is directed to cause to be paid thereout, at such times and by such payments as he may direct, the sums mentioned in the sub-section. This control is so vested in the Lord Lieutenant, not in his individual capacity, but *virtute officii*, and, therefore, as a servant of the Crown. By sub-section 5 if the amount paid in to the account under the section exceeds the sums payable thereout

under that section, the excess is to be accumulated, and applied to meet any future deficiency, and, subject thereto, is to be applied in such manner as Parliament directs.

Even had not Parliament reserved this right, the payment into this account could not, in my opinion, change the property in the sum paid in. But this reservation renders this question unarguable. The money to the credit of the account continues, until applied as directed by the Act, to be the property of the Sovereign, just as moneys paid by the Treasury to, or put by them to the credit of, an account in the name of a subject, or to be drawn upon by any other public Department, say, the Board of Admiralty or the Education Board, remain the property of the Sovereign until duly applied. The effect of the payment is no more than to segregate it from the general mass of moneys constituting the Consolidated Fund. It is an allocation by the Sovereign, through his ministers and servants, of the particular sum to the particular account for which so much of the Consolidated Fund was intended by Parliament to be applied, but an allocation not sufficient to divest the property in it out of the Crown.

I understood the Attorney-General to suggest that, as the money in question had left the hands of the Commissioners of the Treasury, the fact that, if the suppliants be successful in this petition, those Commissioners will, under section 14 of the Petition of Right Act, be liable to pay the amount to which the suppliants may, by our judgment, be declared entitled, in itself shows that the petition cannot be sustained. I cannot agree. In my opinion the Petition of Right Act neither abridged nor extended the right which existed prior to the Act, to maintain such a petition. That right is not against the Commissioners of the Treasury nor against any servant of the Crown. It is one to be satisfied by the Sovereign himself, and the provision in section 14 of the Act directing payment of the amount by the Commissioners of the Treasury, if the petition relates to a public matter, as does the present one, is one just and beneficial to the subject and dignified to the Crown, by securing prompt payment to the subject by the authority charged with the financial control of the entire executive, irrespective of the particular Department of State in relation to which the question has arisen. If there be, or ought to be, money subject to

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the control of the Crown, which ought to have been, and has not been, paid to the suppliant, when judgment is obtained, it is to be satisfied by the Commissioners of the Treasury. They can settle with the Department in question when making future payments; but with questions between different Departments of State the suppliants are not concerned. Such matters afford no answer to the petition of right.

I have said so much in consequence of the earnestness with which the appeal has been argued by the learned Attorney-General and his colleagues. Had it not been for the confidence with which they pressed the appeal upon us, I should have been satisfied to have rested my decision upon the judgment of Barton, J., in every word of which I concur. I have not adverted to the question which may have arisen by reason of the death of His late Majesty pending the appeal, as it was not suggested by the Attorney-General.

In my opinion, the appeal should be dismissed with costs.

Solicitor for the suppliants: *Ignatius J. Rice.*

Solicitor for the Crown: *Malachy Kelly.*

W. G.

## IN RE GLEESON, DECEASED. SMYTH v. GLEESON.

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*Presumption—Person in loco parentis—Gift by deed—Subsequent will—  
Rule against double portions—Satisfaction—Presumption of—Difference  
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G., by a voluntary deed, declared that he, his executors or administrators, or such other person or persons as he should by deed or will appoint trustee or trustees of the deed, should stand and be possessed of a sum of £6958 10s. 1d., secured by mortgage on the D. estate upon trust to receive the annual interest and income, and pay the net income to his sister E. for life or spinsterhood, with other limitations in the case of her death or marriage. The mortgage was a well-secured first mortgage, and the deed contained wide power of investment. G. received the interest and regularly paid it over to his sister. By a subsequent will he appointed trustees and executors and gave them all his real and personal property upon trust, *inter alia*, to pay to his sister E. the interest on £6500 for life or until she should marry. The powers of investment were restricted, and the subsequent limitations were different from those of the deed. It was provided by the will that if the testator's securities and investments should so depreciate that they were unable to pay to his sister E. £180 a-year, she was only to receive £100 a-year, the balance of the income of the £6500 to be accumulated for the benefit of his sons. By a codicil he increased the gift to his sister E. by £400.

*Held*, that assuming the testator had placed himself *in loco parentis* to his sister E., and that there was a presumption of satisfaction, the presumption was rebutted by the difference in point of certainty and value between the obligations of the trust deed and the gift in the will.

## ADJOURNED SUMMONS.

The plaintiffs were the executors of the will of the late Gerald Gleeson, who died on the 29th October, 1906. It appeared from the affidavit of the executors that Gerald Gleeson was the only son of a Dr. Edward Gleeson, who made a fortune of about £100,000 out of the Athlone Woollen Mills. Dr. Edward Gleeson died in August, 1895, having, by his will, bequeathed the bulk of his property to his only son Gerald, and having thereby provided for his daughters by leaving them £20,000 between them for fortunes. Four daughters survived him, and

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became entitled to fortunes of £5000 each. Three of them were married and settled. One, Evelyn, was a spinster, and resided with her mother, who had an ample annuity. The mother died soon after her husband. Evelyn was left with her fortune of £5000 and some house property, which was not considerable. Gerald Gleeson made a will, dated the 29th January, 1896, by which he left his sister Evelyn £300 a year and £2000 cash. He appears to have, after this date, negotiated for the investment of a sum of nearly £7000 in the purchase of a transfer of a mortgage upon the O'Donoghue Estate in county Westmeath. The exact sum advanced on the security was £6958 1*s.* 1*d.* While these negotiations were pending he made a second will, dated the 27th April, 1896, in which he left to his three married sisters £2000 each, and to his sister Evelyn £7000 absolutely. This sum was originally described in his will as "Now on mortgage of the O'Donoghue Estate," but these words were struck out by the testator. The cancelling of these words was accounted for by the fact that the transfer of the mortgage to the testator was not executed until May, so that the descriptive words would not have been true on the 27th April.

Having in May, 1896, obtained a transfer of the O'Donoghue mortgage, Gerald Gleeson executed a voluntary trust deed dealing with the mortgage security on the 27th July, 1896. His instructions to Mr. Drummond, K.C., for the preparation of that deed, contained the following passage:—"Mr. Gleeson is desirous of settling the income of this sum upon his sister, Miss Evelyn Gleeson, for her life, or until she marries. This is a voluntary act on the part of Mr. Gleeson, and in consideration of the natural love and affection, as he considers, having regard to the position in which his father died, his eldest and only unmarried sister was not sufficiently provided for by his father's will." The deed was in the form of a deed-poll whereby, after recitals showing the investment of the sum of £6958 10*s.* 1*d.* on the security of the O'Donoghue Estate, Gerald Gleeson declared that he, his executors or administrators, or such other person or persons as he should by deed or will appoint as trustees or trustee of the said deed, should stand, and be possessed of the said sum of £6958 10*s.* 1*d.* secured by the therein recited mortgage and the interest thereof

upon trust to receive the annual interest and income, and after deducting all necessary expenses and outgoings in respect thereof to pay the residue of such annual interest to his sister Evelyn for her life, or so long as she should remain unmarried; and that in case of the death or marriage of his said sister Evelyn the trustees should stand possessed of the said trust fund upon trust for the settlor's wife, if living at the time of Evelyn's death or marriage; but if she should not be living, then in trust for the settlor if living, and, if not, for his executors or administrators. The deed conferred upon the trustees very wide powers of investment. Gerald Gleeson revoked his former wills by his last will, dated 11th March, 1901. He appointed executors and trustees, and gave them all his real and personal property upon trust, *inter alia*, to pay to his sister Evelyn the interest on £6500 for her life, or until she should marry. The powers of investment were limited, and the subsequent limitations were different from those of the £6958 10s. 1d. which was settled upon his sister Evelyn by the deed of 1896. He also gave his widow £1200 a year to be reduced to £200 in case of a second marriage. By the will he provided that if the testator's securities and investments should so depreciate that they were unable to pay yearly to his wife £1200, and to his sister Evelyn £180, a year each, then his wife and sister were only to receive respectively yearly—His wife £900 a year and his sister Evelyn £100, the balance over the sum of £1000 a year to be accumulated for the benefit of his sons.

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Afterwards a daughter was born, and by a codicil he left this daughter £10,000, and raised his wife's annuity to £1400. He also increased the gift to his sister Evelyn by £400.

No trustees were ever appointed of the deed of the 27th July, 1896, under the terms of which Gerald Gleeson's executors became trustees of the deed after his death. They did not treat the O'Donoghue mortgage debt as part of his estate, or include it in his schedule of assets. Evidence was given that the mortgage deed was well secured. A valuation had been made at the time of the execution of the deed, showing an ample margin of income. The testator had regularly received the interest during his lifetime, and had paid it to his sister. The deed contained wide power



*Barton, J.* of investment, and it was admitted that, under the deed, Miss  
 1910. Evelyn Gleeson had a well-secured income for her life of between  
*SMITH* £200 and £300 a year.

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*A. F. Blood, K.C.* (with him *McGusty*), for the executors and trustees of the will of Gerald Gleeson.

*Ronan, K.C., Matheson, K.C., and Phelps*, for the defendant, Evelyn Gleeson.

In order to raise any question of satisfaction it must, in the first place, be shown that Gerald Gleeson had placed himself *in loco parentis* to his sister, Evelyn Gleeson. The *onus* is on the assertor of this fact: *Re Ashton*; *Ingram v. Papillion* (1), and that *onus* has not been discharged. This is the case of a younger brother, with a family of his own, making a gift to a much older sister, not by way of advancement to her, or maintenance for her, for she was already provided with a fortune under her father's will, but in order to give her something out of his bounty, which he thought would place her in a position of equality, as regards money, with the rest of her sisters. There is nothing either in the documents or the circumstances of the case to show that Gerald Gleeson meant to assume the office of a parent, or that he had placed himself in a position which cast on him an obligation to provide for his sister. The instructions to Mr. Drummond bear out this view. They amount to no more than this:—"I do not think Evelyn got enough from my father—I wish to give her some of mine." It is simply a case of bounty; and there was no reason why testator should not give her further benefits under his will as bounty, just as he does to others: *Powys v. Mansfield* (2); *Ex parte Fye* (3).

Even if a presumption of satisfaction could arise, it is rebutted by the facts; and the presumption of double portions is more easily repelled when the settlement precedes the will, especially where there are substantial differences in the two instruments: *Lord Chichester v. Coventry* (4).

It cannot have been contemplated that the benefits under the will of 1901, which are not similar or equal in value or

(1) [1897] 2 Ch. 574, 578.

(2) 6 Sim. 528; 3 M. & Cr. 559.

(3) 18 Ves. 140.

(4) L. R. 2 H. L. 71.

certainly of security to those conferred by the deed of 1896, were to be taken as satisfaction of the first gift. Roughly, under the deed, Evelyn Gleeson gets an income of £300 a year for life or till marriage, and the *corpus* goes to the wife of the settlor. The will gives Evelyn the income on a sum of £6500 for life or till marriage, and the widow takes no interest in the *corpus*. Instead of £300 a year, Evelyn is to get at the outside an income of £180, and perhaps only £100 a year under the will. There is not the same income, or certainty of income, or security given by the latter instrument; and the conditions and limitations in the will and deed are not similar. Slight differences might be immaterial, but in the present case they are great and various: *Chichester v. Coventry* (1).

The presumption of satisfaction is negatived in this case also, from the fact that the first gift had been paid over: *Douglas v. Willes* (2).

*H. Wilson, K.C., Horner, K.C., and Brunskill*, for the residuary legatees.

The bequest in the will of Gerald Gleeson, of 11th March, 1904, to Evelyn Gleeson for her life, or until marriage, was made in satisfaction, or partial satisfaction, of the benefits conferred on her by the deed-poll of July 27th, 1896.

It must be presumed from the facts that Mr. Gleeson had placed himself *in loco parentis* towards his sisters. That is a simple form of presumption. It means that one person takes upon himself the duty of a father to make provision for a child. It does not depend on an inference to be drawn from a series of acts, but from the intention, express or implied, of the person who makes the gift. Intention is the one test: *Powys v. Mansfield* (3); and a brother may place himself in the position of a parent towards a brother or sister: *Monck v. Lord Monck* (4). The instructions to Mr. Drummond show that, in making the settlement on his sister, Gerald Gleeson was doing what he thought his father should have

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(1) L. R. 2 H. L. 71.; 2 De G.

(3) 3 M. & Cr. 367.

J. & S. 336; 2 H. & M. 149.

(4) 1 B. & B. 298.

(2) 7 Hare, 318, 328.

*Barton, J.* done, and what he would have done if he had been in his father's place, and imposed on himself a moral obligation to provide for her. It is a question of intention: *Lewin on Trusts*, 477; *Powys v. Mansfield* (1); *In re Ashton*; *Ingram v. Papillion* (2).

Then the presumption of satisfaction arises, and that means that the obligations under the trust-deed are satisfied by the provisions of the last will. The legal presumption is that the first gift is satisfied by the second once it appears that testator meant to assume the office of a parent, and discharge parental duties. The Court leans against double portions: *Lacon v. Lacon* (3); *Langton v. Scott* (4). The gifts are *ejusdem generis*. The provisions in the deed and the will are substantially the same, and small differences do not prevent the application of the presumption of law: *Weall v. Rice* (5); *Tussaud v. Tussaud* (6). The trustees of the deed are the executors and trustees of the will, and they have imposed upon them (at any rate in the case of Evelyn Gleeson) substantially trusts of the same nature. Identity of benefit is not necessary, nor are variations as to limitations sufficient to prevent the application of the rule that the Court leans against double portions. There may be part satisfaction: *Jesson v. Jesson* (7); *Lord Chichester v. Coventry* (8); *Thynne v. Glengall* (9).

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BARTON, J. :—

The first question is, whether the testator stood at the date of the will *in loco parentis* to his sister. It is said, on the one hand, that the instructions to Mr. Drummond show that, in making a settlement on his sister, Gerald Gleeson was doing what he considered his father should have done, and, therefore, that he was taking his father's place. On the other hand, it is pointed out that Evelyn was an elder sister, considerably older than the testator; that she was under her father's will provided for by a

(1) 3 Myl. & Cr. 367.

(2) [1897] 2 Ch. 574.

(3) [1891] 2 Ch. 482, 498.

(4) [1903] 1 Ch. 1.

(5) 2 R. & M. 268.

(6) 9 Ch. Div. (C. A.), 363.

(7) 2 Vern. 255.

(8) L. R. 2 H. L. 71, 92.

(9) 2 H. L. C. 131.

fortune of £5000 and other property ; and that the deed of 1896 more resembles a generous gift by an affectionate brother than the assumption of a parent's responsibility. I do not find it necessary to say more than that it is at least doubtful whether the testator ever placed himself *in loco parentis* towards his sister.

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The next question is, whether this is a case to which the doctrine of satisfaction is applicable. By the voluntary deed of 1896 the testator severed in equity this O'Donoghue mortgage security from his estate. The trustees and executors of his will, who are also trustees of the deed of 1896, have treated it on that basis, and not as part of the estate of their testator. The doctrine of satisfaction has no application to cases where the prior portion has actually been transferred or paid. In the present case the mortgage debt had been transferred in equity, and the interest was regularly paid to Evelyn Gleeson during the testator's life. On the other hand, it might be contended that the obligations of the deed of 1896 being equitable, a Court of Equity would not enforce them without regard to the doctrine of satisfaction. It is by no means clear that this is a case to which the doctrine of satisfaction is applicable.

Assuming, however, that the testator did stand *in loco parentis* towards his sister, and that there was a presumption of satisfaction, I think that the presumption is rebutted by the difference between the provision made by the voluntary deed and by the will. I do not refer to the differences as regards the subsequent limitations. I refer to the difference in point of value and certainty of the gifts. The provision by the voluntary deed is a sum of about £6900, well secured by a first mortgage upon an estate which shows, after providing for the mortgage debt and the interest thereon, an ample margin of income and of capital value. This appears both by the valuation made at the date of the deed and by the result of the sale of the O'Donoghue estates to the tenants through the Irish Land Commission. The powers of investment are very wide, and Miss Evelyn Gleeson has under the deed a well-secured income of from £250 to £300 a year for her life. The gift in the will is the interest on a sum of £6500, which he contemplates may fall below £180 a year, and if so is reducible to £100. There was a further gift of £400 in the codicil. Can a life interest in the income of a fund so variable and reducible to a sum relatively so



*Barton, J.* small, be held to have been intended to be a satisfaction  
 1910. for the life interest in a well-secured first-mortgage debt, the  
*SMYTH* interest on which is not reducible, or variable save by the exercise  
*v.*  
*GLEESON.* of a wide power of investment?

I am not aware of any case in which a bequest was held to be a satisfaction of a previous obligation when it was so different in point of certainty and value. In spite of the similarity of the amount settled by the deed and by the will respectively, I am of opinion that there was no satisfaction.

Solicitors for the executors and trustees of the will: *Fred. Sutton & Son.*

Solicitor for the defendant Evelyn Gleeson: *James A. Doyle.*

Solicitor for the residuary legatees: *R. N. Potterton.*

R. W. L.

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## COYLE v. COYLE.

Nov. 2. *Evicted Tenants (Ireland) Act, 1907 (7 Edw. 7, c. 56)*—*Person nominated by Estates Commissioners as personal representative of deceased evicted tenant—Trustee—Grant.*

Where the Estates Commissioners, under the provisions of the Evicted Tenants (Ireland) Act, 1907, vest a holding in a person nominated by them as personal representative of a tenant of a holding formerly occupied by an evicted tenant, such person is a trustee of the holding for the next-of-kin of the evicted tenant.

### CIVIL BILL APPEAL.

Hugh Coyle died intestate on the 23rd November, 1898, and letters of administration to his estate were, on the 22nd February, 1899, granted to his widow, Mary Coyle. At the date of his death, Hugh Coyle was in possession of a licensed house and premises as lessee under a lease for a term of thirty-eight years from 1877. Mary Coyle continued to reside on the licensed premises, the license of which was transferred to her, and on the 26th September, 1902, entered into an agreement to assign the premises to her son, Philip Coyle, subject to certain provisions as to

the support and maintenance of herself and her children. Philip Coyle died in 1903, having by his will devised the licensed premises to his sister, Kate Coyle, subject to the aforesaid provisions for support and maintenance. After the death of Philip Coyle, Kate Coyle took out probate to Philip, and got a transfer of the license to her own name, and in January, 1910, brought an ejectment on the title against Mary Coyle, and obtained a decree for possession of the licensed premises, which was affirmed on appeal and executed by the sheriff.

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*COYLE*  
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*COYLE.*

Hugh Coyle had formerly been tenant from year to year of two farms of land, one being situate in the townland of Kilnaleck and the other in the townlands of Toneylion and Coolkill, county Cavan, but, some years prior to his death, had been evicted therefrom for non-payment of rent. In the year 1910 these holdings were, under the Evicted Tenants (Ireland) Act, 1907, vested in the widow, Mary Coyle, the person nominated by the Estates Commissioners as the personal representative of the deceased evicted tenant; and Mary Coyle went into possession of the holdings. In 1909 Mary Coyle instituted Equity proceedings in the County Court against her daughter, Kate Coyle, for the administration of the estate of Hugh Coyle. In the administration proceedings, the County Court Judge held that the licensed premises did not form portion of the assets of Hugh Coyle, deceased, and further, that the plaintiff, Mary Coyle, now held the holdings, which had been vested in her under the Evicted Tenants (Ireland) Act, in trust for the next-of-kin of Hugh Coyle. From this decision the plaintiff, Mary Coyle, appealed to the Lord Chancellor, who, under section 45 of the County Courts (Ireland) Act, 1877, assigned the appeal to Mr. Justice Ross.

*Horner, K.C.*, and *Henry Kennedy*, for the plaintiff (appellant).

The plaintiff is beneficially entitled to the farms. The principle of graft does not apply where there is no "life in the old stock." *Dempsey v. Ward* (1). Here there was no life in the old stock. The children had been out for twenty years, the widow is reinstated

Ross, J. for her own benefit; she is provided with stock and implements.  
 1910. The policy of the Evicted Tenants Act was to start the new  
 COYLE tenant as a solvent tenant. Under other sections of the Land  
 v. Acts the Land Commission appoints personal representatives,  
 COYLE. where there is no legal personal representative, and where limited  
 administration is necessary for the purposes of the sale (Land  
 Act, 1881, sect. 14; Land Act, 1903, sect. 69 (2)). Here the  
 words are different from the words used elsewhere, and no graft  
 was intended. In section 8 of the Land Act of 1885, and section 14  
 of the Land Act of 1887, where it was intended to apply the  
 principle of graft, the word "graft" appears. If a creditor is to  
 have no right (Evicted Tenants Act, sect. 11 (2)), why should the  
 farms be assets in favour of the next-of-kin? The person  
 nominated takes the farms and the new stock as nominee, and  
 not as legal personal representative.

*Denis Henry, K.C., and W. E. Wylie, for the defendant*  
 (respondent):—

The words used in the Act of 1903, sect. 2 (1) (d), and in the  
 Evicted Tenants Act, sect. 1 (2), show that the person nominated  
 by the Land Commission takes in a representative capacity. The  
 restriction contained in sect. 11 of the latter Act is only as  
 regards the debts of the deceased, and does not bar equities. In  
 sect. 13 of the Act of 1891 the words "personal representative"  
 are used in connexion with an evicted tenant, and in sect. 47 of  
 the Act of 1896 the words "heir" and "personal representative"  
 are contrasted. If the plaintiffs' contention is correct, the Land  
 Commission might nominate a rich son to the exclusion of his  
 poorer brothers.

Ross, J. :

Two questions arise in this case. The first is as to the public-  
 house. The circumstances of the case are these—Hugh Coyle,  
 the deceased owner of the public-house and farms, died in 1898.  
 The widow took out administration and carried on the business  
 of the public-house. The licence was in danger, and it was  
 suggested that some of the children of the family should carry

on the trade in order to save the interest in the licence. The widow makes over the entire premises to her son. An administrator cannot make a present of the interest of the other next-of-kin, but she can make a deed of family arrangement, and such deeds are often supported by very small consideration. When the proceedings in ejectment on the title were instituted against the widow, it was held that she was estopped by the family settlement, and she was put out of possession by the decree of the County Court Judge confirmed on appeal. I cannot interfere with that decision. I will therefore declare that the licensed premises are not assets of the deceased, but I put an express declaration on my order that it is without prejudice to any claim by the next-of-kin on the licensed premise under the family settlement, and to any claim by the widow under the award.

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COYLE.

The second question is one of more importance. If there were no Evicted Tenants Act, I should hold that the principle of graft applied, because of the relationship in which the widow stands to the former tenant. She got the farm by reason of the fact that she was the personal representative of her predecessor. But we must consider section 2 (1) (d) of the Land Act, 1903. In that section provision is, for the first time, made for evicted tenants. It provides that advances may be made for the purchase of parcels of land by, *inter alios*, "a person who, within twenty-five years before the passing of the Act, was the tenant of a holding to which the Land Law Acts apply, and who is not, at the date of the purchase, the tenant or proprietor of that holding: Provided that in the case of the death of a person to whom an advance under this paragraph might otherwise have been made, the advance may be made to a person nominated by the Land Commission as the personal representative of the deceased person." These persons are, by section 1 (2) (a) of the Evicted Tenants Act, 1907, declared to be evicted tenants to whom the latter Act applies. It is contended that any person at all may be nominated by the Estates Commissioners, and that such person becomes beneficially entitled; but that argument leaves out of consideration the words, "as the personal representative of the deceased person." That means that the person is nominated in the capacity of personal repre-



*Ross, J.*     representative of the former holder, and holds the property as a trustee  
1910.     for somebody. For whom, if not for the next-of-kin? What is  
*COYLE*     the necessity for section 11 (2) of the Evicted Tenants Act, if the  
*v.*     land vests absolutely in the person nominated by the Estates  
*COYLE.*     Commissioners? That section provides that "no parcel of land  
purchased by an evicted tenant under the Land Purchase Acts  
shall be made available in any bankruptcy, or by any other process  
or proceeding of law, to pay, satisfy, or discharge, in whole or in  
part, any debt contracted or incurred by such evicted tenant prior  
to the date on which the parcel of land became vested in him."  
What is the necessity for that sub-section, if the new interest is an  
absolute interest?

I must hold that the widow takes the farms as trustee for the  
next-of-kin. The appeal must be dismissed. I expressly preserve  
any rights of the next-of-kin and of the widow, under the deed of  
settlement and award.

Solicitor for the plaintiff (appellant): *T. D. Vance.*

Solicitors for the defendant (respondent): *L. C. P. Smith.*

D. M. S.

IN RE OWEN MOONEY'S ESTATE; MARY MOONEY  
 (CONTINUED IN THE NAME OF PETER COYLE), PLAINTIFF v.  
 PATRICK M'MAHON, HIS MAJESTY'S ATTORNEY-  
 GENERAL FOR IRELAND, THE VENERABLE  
 ARCHDEACON P. M'GLONE, AND MARGARET  
 M'MAHON, DEFENDANTS.

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 9.

Appeal.  
 1911.

Jan. 20, 30.

*Will—Charitable devise—Estate in lands—Death of testator within three months—Registration—Estate passing—7 & 8 Vict. c. 97, s. 16—Local Registration of Title (Ireland) Act, 1891, sects. 25 and 35.*

A., the owner in fee of lands purchased by him (prior to the passing of the Local Registration (Ireland) Act, 1891), under the provisions of the Irish Land Purchase Acts, subject to an annuity to the Irish Land Commission, purported to divide the lands into four lots, which in 1905 he sold to purchasers, subject to apportioned parts of the annuity, the sale in each case being made subject to the consent of the Irish Land Commission being obtained to such sub-division and apportionment, and power being reserved to the vendor to annul the sale in case such consent should be withheld. Subsequently, each purchaser was let into occupation of his portion of the lands under an agreement which provided that he was to be regarded as in possession temporarily only, and that in the event of the sale being annulled he should be chargeable with an occupation grant. A., who had never been registered as owner of the lands under the Local Registration of Title (Ireland) Act, 1891, died prior to the consent the Irish Land Commission being obtained to the said sub-division, having on the day prior to his death executed a will, by which, without expressly referring to the said lands, or the purchase-moneys payable therefor, he devised and bequeathed the residue of his property for charitable purposes. Some time after the testator's death, the consent of the Irish Land Commission having been then obtained to the said sub-division, the executors of his will were registered as owners of the lands, and, thereupon, executed transfers to the four purchasers, each of whom became registered as owner of the portion of the lands purchased by him.

*Held*, by the Court of Appeal (affirming the decision of the Master of the Rolls), that the testator had an "estate" in the lands at the time of his death, within the meaning of section 16 of 7 & 8 Vict. c. 97; and that, accordingly, the residuary devise of the said lands for charitable purposes failed.

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v.

M'MAHON.

## SUMMONS.

Owen Mooney, prior to the passing of the Local Registration of Title (Ireland) Act, 1891, purchased the lands of Anveyerg, Drumcreeghan, and Drumhillagh, under the provisions of the Irish Land Purchase Acts, and the said lands were vested in him in fee subject to a terminable annuity payable to the Irish Land Commission.

On the 31st January, 1905, Owen Mooney purported to divide the said lands into four holdings, which he put up for sale by public auction on the 31st January, 1905, subject to apportioned parts of the annuity. The conditions of sale provided that each lot was offered for sale strictly subject to the approval of the Irish Land Commission to the sub-division and apportionment aforesaid, and that in the event of the Irish Land Commission objecting to sub-divide the lands comprised in the vendor's vesting order, and to apportion the annuity, the vendor should be entitled to annul the sale.

Three of the lots were sold on the 31st January, 1905, and the fourth on the 10th day of March, 1905, and each purchaser was let into occupation of the lands purchased by him under an agreement made between the vendor and the four purchasers respectively on the 31st March, 1905, whereby it was (*inter alia*) provided that each purchaser agreed that he was let into occupation temporarily, and not into the full ownership, that in case the sale of any lot should be annulled by the vendor, the purchaser of such lot would thereupon deliver up quiet possession of the same; and that in case any sale should be annulled, the purchaser of the lot should pay to the vendor an occupation rent to be thereafter determined. The said Owen Mooney made his will on the 9th day of October, 1905, whereby, after certain pecuniary bequests, he directed his executors to sell his farms of land in Carrickabawn and Mullinanault (to which this appeal did not relate), and all his stock, crop, and chattels thereon, and to lodge the proceeds of such sale in bank; he bequeathed the interest on same, and on all other moneys, to his wife for her life, and after her death (subject to a legacy for masses) he bequeathed and devised "the residue of my property of whatsoever nature for charitable purposes to be distributed, share and share alike, between the Catholic convents in the towns of Cootehill, Castleblayney, and Monaghan."

Owen Mooney died on the 10th October, 1905, and on the 30th March, 1906, letters of administration with the said will annexed of his personal estate were granted to his widow, Mary Mooney, the above-named plaintiff; the executors named in the will, and the Attorney-General for Ireland (as the person entitled to administration with said will annexed) having duly renounced.

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Owen Mooney during his lifetime had applied to be registered under the provisions of the Local Registration of Title (Ireland) Act as full owner of the said lands of Anveyerg, Drumcreeghan, and Drumhillagh, but such registration had not been completed at the time of his death. After his death the plaintiff, Mary Mooney, applied to be registered as limited owner of the lands, but this application was refused by the registering authority. Subsequently, however, the registering authority agreed to register the executors of Owen Mooney's will as owners, notwithstanding that they had renounced probate of the will, and this registration was completed on the 15th November, 1900. Four separate transfers were on the 7th December, 1908, executed by the said executors to the four purchasers of the respective holdings purchased by them, and these purchasers became registered as full owners, each of his own holding, the Land Commission having, on the 18th October, 1907, consented to the sub-division of Owen Mooney's original holding, and to the apportionment of the annuity. The present summons was brought by the plaintiff as personal representative of Owen Murray, against the heir-at-law of the deceased, one of his next-of-kin, and the Attorney-General for Ireland, for the determination of the question whether, in the events which had happened, the bequests and devise contained in the will for charitable purposes were valid, and if so to what extent—(a) as regards the lands of Anveyerg, Drumcreeghan, and Drumhillagh; (b) as regards the lands of Carrickabane and Mullinanault; and (c) as regards the remainder of the testator's estate and effects.

*M'Cann, K.C., and Collins, for the plaintiff.*

*Molony, K.C., and Dudley White, K.C., for the Attorney-General in support of the alleged charitable gift.*

*Dromgoole, K.C., and Calvert, for the heir-at-law of Owen Mooney, the deceased testator, contra.*



M. R.  
1910.

THE MASTER OF THE ROLLS:—

MOONEY  
v.  
M'MAHON.  
June 9.

I have heard a most able argument from Mr. Molony and Mr. Dudley White on behalf of the Attorney-General, and when I say argument I may extend that word, because neither of them confined himself to one argument, but dealt with the Land Acts of 1860 and 1881, and the Local Registration of Title Act, 1891, as well as with 7 & 8 Vict. c. 97, section 16, the Charitable Donations and Bequests (Ireland) Act, 1844.

When all is said and done, the case turns on section 16 of 7 & 8 Vict. c. 97. What the testator intended to devise by his will was an estate in these three farms of land in favour of the charity. The will was dated the day before his death. If I am right in that view, then section 16 of the Act makes the devise bad. [The Master of the Rolls read the section.] It has been held in numerous cases that a devise of lands on trust to sell and to pay over the proceeds to a charity is invalid under that section, and I cannot differentiate between a devise of that description and a case like the present. All the testator here had done was to set up the lands for sale, subject to certain conditions of sale, one of which was that the whole of the sale was to be subject to the sanction of the Land Commission to the sub-division of the lands, and to the apportionment of the annuity. I am not going through the conditions of sale, but I agree with the short but trenchant criticism of the conditions of sale made by Mr. Collins in his reply. It is hardly a case of vendor and purchaser at all. Then the working agreement of 31st March, 1905, was arrived at. What is it? [The Master of the Rolls read from the agreement.] It refers to the sale being subject to apportionment of the annuity, and subject to the sanction of the Land Commission, and that in case the Land Commission should not sanction the sale the vendor should be entitled to annul the sale as provided by the conditions. Each purchaser agreed with Owen Mooney that he should let him into working possession pending the completion of the respective purchases. In my judgment, matters not having progressed at the date of the will and death an inch beyond these two documents and the attempted sale, these two documents left in the testator an estate in the lands

by virtue of which he was entitled to sue for and recover rent, if the conditions were not complied with. This left in him an estate in the lands which he purported to devise for the benefit of the charities under his will, which was executed the day before his death. I do not see that I can add much to what I have said. If the provisions of the Land Purchase Acts and the Local Registration of Title Acts, and the authorities referred to are carefully examined, it is to my mind demonstration that at the crucial moment, namely, the date of the execution of the will, and at the date of the death, he had an estate in lands which he purported to deal with, and *Weeding v. Weeding* (1) has no application in the case of a charitable gift coming within section 16 of 7 & 8 Vict. c. 97; and it would be simply evading the statute and contrary to the express language of the section, and the real intention of the Legislature, if a Judge were to hold that if a testator a day, a week, or a month, before he made his will, entered into a conditional contract of sale, and left the lands by his will, and died within three months, he could by such a device defeat the provisions of the statute. There is no question of device here; it is only a question could the provisions of the statute be got round. I hold that they could not. It is the same as if he had deliberately agreed to sell the lands in order to get out of the statute.

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The order declared that the said residuary bequest and devise was not a good and valid bequest and devise as regards the lands of Anveyerg, Drumcreeghan, and Drumhillagh, and the proceeds of the sale thereof, nor as regards the lands of Carrickabaun and Mullinanault, but was valid as regards the remainder of the estate and effects of the testator.

W. L.

(1) 1 J. & H., 424.

*Appeal.*  
1911.  
MOONEY  
v.  
M'MAHON.

The Attorney-General appealed against so much of this order as related to the lands of Anveyerg, Drumcreeghan, and Drumhillagh (1).

*Molony, K.C., and Dudley White, K.C. (with them J. Linehan),*  
for the Attorney-General :—

The testator, at the moment of his death, had no "estate" in the lands which would attract the operations of sect. 16 of 7 & 8 Vict. c. 97; he was only entitled to the balance of the purchase-moneys payable by the four purchasers. The contracts for sale and subsequent "working agreement" effected a complete conversion of the lands into money prior to the testator's death; *Lawes v. Bennett* (2); *Weeding v. Weeding* (3); and see judgment of Holmes, L.J., in *Re Sherlock* (4); *Doyle's Estate* (5). Even if a bare legal estate remained in the testator, it would be immaterial: *Attorney-General v. Brunning* (6); *Murland v. Perry* (7); *Stewart v. Barton* (8); *Farrar v. Earl of Winterton* (9); *Walsh's Estate* (10). The wording of the will is important. The testator clearly knew what lands he died possessed of, as he specifically bequeathed his farms of Carrickabaun and Mullinanault, but did not mention the lands now in question, the purchase-moneys for which passed under the residuary clause. Reliance will be placed by the other side on sections 25 and 35 of the Local Registration of Title (Ireland) Act, 1891, but it is submitted that they do not affect this case. The object of the Legislature was to ensure registration, not to work injustice and to defeat the intention of testators. Section 61 of the Act provides by the means of "cautions" that the rights of parties interested in the lands should not be prejudiced. Here the purchasers had, even prior to their being registered (and the registration when effected related back (sec. 25 (1)), an "inchoate right incapable of being defeated": *per Chatterton, V.-C.*,

(1) In the Court of Appeal, before THE LORD CHANCELLOR, and LORDS JUSTICES HOLMES and CHERRY.

(2) 1 Cox. Ch. Cas. 167.

(7) 3 L. R. 1r. 135.

(3) 1 J. & H. 424.

(8) 1 L. R. 6 Eq. 215.

(4) [1899] 2 I. R. 561 at 607.

(9) 5 Beav. 1.

(5) [1907] 1 I. R. 204.

(10) M'Carthy, 100.

(6) 8 H. L. C. 243.

in *In re Furlong and Bogan's Contract* (1); *In re Mitchell and M'Elhinney's Contract* (2). *Pim v. Coyle* (3) has no application; there the lands were registered at the date of the judgment mortgage in the name of the judgment debtor, and the plaintiffs could only look to the register, which was conclusive. Section 25 of the Act only applies to conveyances prior to the first registration, and here the executors were themselves registered as owners.

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*D. S. Henry, K.C., Dromgoole, K.C., and Culbert*, for the respondent (the heir-at-law):—

This is a question of public policy; the cases as to conversion do not apply, and, if any "estate" in the lands, whether the latter devolve as realty or personalty, is found to pass by the residuary clause, sect. 16 of 7 & 8 Vict. c. 97 takes effect. It is impossible to contend that the testator had no "estate" in the lands at the time of his death. He had arbitrarily sub-divided the area out of which the annuity was payable; had the Land Commission refused to sanction this, the testator's right to the interest in fee would have arisen again, and the "working agreement" was carefully framed to protect this right, and to prevent the beneficial interest forthwith passing to the purchasers, who, in the event of the sale being annulled, were bound to pay an "occupation rent." The agreement might have been specifically enforced, but that does not decide the case. Under the provisions of the Local Registration of Title (Ireland) Act, 1891 (sections 25 and 35), no estate passed to the purchasers, or could have passed, until they were registered as owners. No doubt the registration when effected related back to the date of the instruments of transfer; but that was long subsequent to the date of the death of the testator, which is the crucial date. Where was the "estate" in the lands then, if not in the testator? Section 25 of the Act has no application to devises: *Torish v. Orr and Smith* (4); and accordingly the "estate" of Owen Mooney in the lands would have been vested immediately after his death in the residuary devisees but for sect. 16 of 7 & 8 Vict. c. 97. *Torish v. Orr* (4)

(1) 31 L. R. Ir. 191.

(2) [1902] 1 I. R. 83.

(3) [1907] 1 I. R. 330.

(4) [1894] 2 I. R. 381.



*Appeal.* was approved of and followed in *M'Gettigan v. Roulstone* (1), and  
 1911. see also *Anderson v. Coyle* (2). *Pim v. Coyle* (3) is conclusive on  
 MOONEY the point that no "estate" passed to the purchasers prior to the  
*v.* testator's death.  
 M'MAHON.  
 Jan. 30. The judgment of the Court was delivered by

CHERRY, L.J. :—

Although the value of the property in dispute in this case is comparatively small, important questions of law on the construction of the 16th section of the Charitable Donations and Bequests (Ireland) Act, 1844, and the 25th section of the Local Registration of Title (Ireland) Act, 1891, are involved in its determination.

The facts are briefly these—The late Owen Mooney purchased in his lifetime, from his landlord, under the Land Purchase Acts, the lands of Anveyerg, Drumcreeghan, and Drumhillagh, and they were duly conveyed to him, in fee-simple, in accordance with the former practice in such cases, by conveyance dated the 23rd April, 1891. There was at that date no system of registration of title in operation; but a few months afterwards the Local Registration of Title (Ireland) Act, 1891, became law, and by the 22nd section of that Act, which had a retrospective operation, registration under the Act was made compulsory in all cases where land had been conveyed to or vested in a purchaser under the Land Purchase Acts, and was subject to any charge in respect of an annuity under those Acts. No penalty was, however, provided in case of non-registration, and, as a matter of fact, the title of Owen Mooney to these lands was never registered during his lifetime.

In the year 1905, Owen Mooney sold the lands in four lots, three of which were sold by public auction on the 31st Jan., 1905, and the fourth by private sale a few weeks later. As this sale involved a sub-division of the lands and an apportionment of the annuity payable out of them, it required for its validity the consent of the Land Commission, and the sales were in each case made expressly subject to such consent being given. Pending the decision of the Land Commission, however, the purchasers were allowed into possession under what was called a working

(1) [1910] 21. R. 17. (2) Lawson, Reg. Cas. 1909, vol. iii., part ix., p. 361.

(3) [1907] 1 I. R. 330.

agreement," dated the 31st March, 1905. By this agreement each of the purchasers admitted that he was "let into occupation temporarily, and not into the full ownership," and agreed that in case the sale were annulled he would pay an occupation rent to be fixed in the manner provided by the agreement.

Things remained in this position until the death of Owen Mooney, which occurred on the 10th of October, 1905. On the day before his death (9th October, 1905), he executed a will, which does not specifically mention these lands, or the proceeds of sale thereof, but the residuary clause of which is in the following terms:—"I bequeath and devise the residue of my property, of whatsoever nature, for charitable purposes to be distributed share and share alike between the Catholic convents in the towns of Cootehill, Castleblayney, and Monaghan." Some time after his death, viz., on 18th October, 1907, the Land Commission gave the necessary consent to the sub-division of the lands, and the registration under the Local Registration of Title Act was then for the first time carried out in the names of the executors named in the will, who duly transferred the lots to the purchasers on the register.

The 16th section of the Charitable Donations and Bequests Act, 1844, provides that—"No donation, devise, or bequest for pious or charitable uses in Ireland shall be valid to create or convey any estate in lands, tenements, or hereditaments, for such uses, unless the deed, will, or other instrument containing the same shall be duly executed three calendar months at least before the death of the person executing the same." Here the will was executed within that period, and the question which arises is, "Did any estate in the lands of Anveyerg, Drumcreeghan, and Drumhillagh, pass by this will, or had it previously vested in the purchasers under the several agreements for the sale of the lands conditional on the assent of the Land Commission?"

On behalf of the Attorney-General, it has been powerfully argued by Mr. Molony and Mr. White, that there was a complete conversion of the property by the sale prior to the death of Owen Mooney, and that the equitable estate in the lands had passed to the purchasers. In support of this contention, they relied upon

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*Cherry, L.J.*

*Appeal.* the leading cases of *Lawes v. Bennett* (1), and *Weeding v.*  
 1911. *Weeding* (2). In the latter of these cases, it was held by Lord  
 MOONEY Hatherley, then Page-Wood, V.-C., that when, after making a will  
 v. devising a specific estate, and bequeathing the personal residue to  
 M'MAHON. other persons, a testator entered into a contract giving an option  
 Cherry, L.J. of purchase over part of the estate, which option was exercised  
 after the death, the property was converted from the date of the  
 exercise of the option, and went to the residuary legatees. The  
 same doctrine was held applicable to sales under the Land Purchase  
 Acts in this Court in *Sherlock's Estate* (3) (see judgment of  
 Holmes, L.J., at p. 607 of the Report); and it may be taken now  
 as settled law that, as regards conversion, an absolute and a  
 conditional sale are in the same position.

In the present case, the Master of the Rolls, however, held  
 that the doctrine of *Weeding v. Weeding* (2) has no applica-  
 tion to the case of a charitable gift coming within section 16  
 of 7 & 8 Vict. c. 97, upon the ground, I presume, that the  
 conversion only operates as between the real and personal  
 representatives; and that, notwithstanding it, the estate in the  
 lands remains vested in the testator until his death. Whether  
 that would be so in the case of a sale not coming within the  
 Registration of Title Act, I have some doubts, having regard  
 to the authorities cited by Mr. Molony; but the provisions of  
 that Act, to my mind, remove all doubt in the present case. The  
 25th section provides that in all cases where the registration of  
 ownership is compulsory (which, it is admitted, includes the  
 present case), "a person shall not under any conveyance acquire  
 any estate in any such land until he is registered as owner of the  
 land." This does not, of course, apply to Owen Mooney himself,  
 for the conveyance to him was made before the passing of the  
 Act; but, in my opinion, it effectually prevents any estate passing  
 from him, by act *inter vivos*, until the new owner is registered in  
 pursuance of the provisions of the Act. If a conveyance cannot  
 divest him of the estate, *a fortiori*, a mere executory agreement  
 for a sale cannot do so.

(1) 1 Cox Ch. Cas. 167.

(2) 1 J. &amp; H. 424.

(3) [1899] 2 I. R. 561.

This construction of the section is in accordance with the entire spirit and intention of the Act, which is to make the register the conclusive and only evidence of title in cases where registration of title is compulsory. It is also in accordance with all the decisions of this Court upon the construction of the Act since it came into operation. The case of *Pim v. Coyle* (1), cited by Mr. Henry, seems to me to be a conclusive authority in favour of the respondent's contention here. There a registered owner of lands, entitled to a beneficial interest therein, transferred the lands to the defendant, who delayed to register his title. In the meantime, the plaintiffs recovered judgment against the registered owner, and registered their judgment in the Local Registration of Title Office a few hours before the defendant was registered as owner of the lands; and it was held by this Court, affirming the decision of Barton, J., that the first registered owner had not effectually parted with his interest in the lands at the date of the judgment and its registration, and that consequently the judgment mortgage charged and affected such interest in priority to the title of the defendant. As a judgment mortgage affects only the beneficial estate of the debtor at the time of the recovery of the judgment (*Eyre v. McDowell* (2)), it follows that in the view of this Court the equitable as well as the legal estate in the lands must have remained vested in the defendant in that case, notwithstanding the conveyance executed by her. It is true that this case was decided under the 35th section of the Local Registration of Title Act, which does not provide, as the 25th section does, that, on being registered, the title of the grantee shall relate back to the date of the execution of the conveyance; but "relation back" cannot help the appellants in this case, for we are bound to look to the state of affairs at the date of the death of Owen Mooney, and anything that took place after his death cannot alter the operation of the will.

To the same effect are the decisions in registration cases. In *Torish v. Orr and Smith* (3) a grantee of freehold lands to which the Local Registration of Title Act applied under a conveyance

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(1) [1907] 1 I. R. 330. (1) 9 H. L. C. 619.

(3) [1894] 2 I. R. 381.



*Appeal.* executed before the commencement of the qualifying period, but  
 1911. whose title was not registered, was held not entitled to the franchise.  
 MOONEY v. Palles, C.B., in his judgment (1), refers to section 25 (1) of the  
 M'MAHON. Act, and says:—"Under this sub-section it is plain that the  
 Cherry, L.J. property does not pass until registration, and it is admitted that  
 there has been no registration in Orr's case. He is, therefore,  
 not entitled to a vote in respect of the property comprised in the  
 deed, and his name must be struck off." As the section which  
 confers the £5 freehold franchise (2) provides in express terms  
 that an equitable as well as a legal estate in fee is sufficient for  
 the qualification, it follows that, in the opinion of the Court, no  
 estate of any kind had passed by the conveyance. This case has  
 been followed in *M'Gettigan v. Roulstone* (3), and in *Anderson v.*  
*Coyle* (4).

The appellants rely upon the decision of Chatterton, V.-C., in  
*Inre Furlong and Bogan's Contract* (5), where it was held that a condi-  
 tion of sale which precluded a purchaser from objecting by reason of  
 the non-registration of title of land similarly situated was good;  
 but in giving judgment in that case the learned Judge used  
 language which clearly showed that he took the same view of the  
 operation of the section. "The sale took place," he says, "and  
 Mr. Bogan purchased with full knowledge of all the facts, and  
 bound himself by the particulars which he signed. He now seeks  
 to get out of his contract, and contends that the whole contract  
 is void, and that by the operation of the 25th section the vendor  
 had nothing to sell. I cannot agree in this contention. It is  
 true that *the vendor had not yet acquired any estate in the lands*, but  
*she had an inchoate right incapable of being defeated, and only*  
*waiting for an official duty to be performed to become an absolute*  
*estate"* (6).

Such being the uniform view of every Judge who has construed  
 this section, I do not think that there can be any doubt that  
 all the estate, both legal and equitable, in other words, the full  
 beneficial ownership of these lands, remained vested in Owen  
 Mooney until the moment of his death, and that the subject of

(1) [1894] 2 I. R. 382.

(2) 13 & 14 Vict. c. 69, sect. 2.

(3) [1910] 2 I. R. 17.

(4) 3 Lawson, 361.

(5) 31 L. R. Ir. 191.

(6) 31 L. R. Ir., at pp. 194-5.

the gift for charitable purposes by his will is his estate legal and equitable in the lands. This gift is, therefore, void under 7 & 8 Vict. c. 97, section 16. For these reasons I am opinion (in which the other members of the Court concur) that the judgment of the Master of the Rolls should be affirmed.

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Solicitor for the Attorney-General: *J. E. MacDermott.*

Solicitors for the respondents: *Corr & O'Connor.*

R. ST. J. C.,

### KEARNEY v. KEARNEY.

*Barton, J.*  
1910.

*Will—Legatee—Attestation by legatee—Gift over—Failure of prior gift—Acceleration—Wills Act, 1837 (1 Vict. c. 26), s. 15.*

Nov. 7, 28.

*Appeal.*  
1911.

Jan. 23.

A testator made a bequest of chattels real to T., with a gift over in the event of his dying without issue to J. and K. T. attested the execution of the will, so that the bequest to him became void. He was alive and unmarried. There was no residuary gift in the will. *Held*, that the gift over to J. and K. was not accelerated, and that it was only in the event of the death of T. without issue that they would be entitled to the chattels real.

Judgment of Barton, J., affirmed by Court of Appeal.

Thomas Kearney, of Castleisland, in the County of Kerry, made, and duly executed, his will, dated 24th July, 1897, as follows:—

“CASTLEISLAND, *July 24th, 1897.*

“IN THE NAME OF GOD, AMEN, I, THOMAS KEARNEY, of Castleisland, make this my last Testamentary Will, and annul any previous Wills made. I will to have all my just debts paid. I will and bequeath to my only daughter, Maggie, 100 shares in the Cork and Muskerry Light Railway, value £775, and twenty shares in the National Bank, value £380, six shares in Guinness's Brewery, value £348, and interest on amount added, provided she takes the advice of my trustees hereinafter named: Revd. Archdeacon O'Leary, P.P., Jeremiah Nolan, Jeremiah Rothe, J.P.,

*Barton, J.* and Tom Kearney, junr., Castleisland. Should my daughter  
 1910. Maggie elect to go into a convent, I will her only £800 of the  
 KEARNEY above-named sums, the balance to be given added my brothers,  
 v. share and share alike. I will to my wife, Julia, during her life,  
 KEARNEY. provided she does not get married, the yearly rent of six houses in  
 old Chapel Lane, together a sum £200 0s. 0d. Should she marry,  
 she is to get only the sum of £200 0s. 0d., no claim to the rent of  
 the six houses in Chapel Lane, which I will to Tom P. Kearney,  
 my clerk in the shop. Should my wife not marry, she is only to  
 have the life use of the houses in Chapel Lane. I will to Thomas  
 P. Kearney the house and shop I am living in, and the house  
 adjoining it, occupied by Miss Minnie O'Connor, and to carry on  
 the business with my wife, share and share alike, until he is  
 thirty-two years of age. Then he can take the entire control of the  
 business. I will and bequeath John Coffie's daughter, Maggie,  
 £50, together with £50 her father owes me—goods, £30, and  
 I.O.U., £20. I will and bequeath to Tom J. Kearney, and Tom  
 James Kearney, Cordal, £200 each when they are of age, or earlier,  
 should their fathers require it for them, this money to be taken out  
 of the money due to me from the customers. The balance of the  
 money due to me from the country to be divided share and share  
 alike between my four brothers, Pat, Peter, James, and John  
 Kearney. Pat and Ml. Kearney, now in America, is to get £100  
 out of outstanding money in the country. I will to Bridget  
 Kearney £100 out of Dunlop deferred shares, to be sold when  
 she wishes. I will £20 to Presentation Convent, Castleisland, for  
 clothing the poor, and £12 to the three priests of Castleisland  
 for saying Masses for me. I will £5 to Franciscan Fathers,  
 Killarney, for saying Masses for my soul, and £5 to Dominican  
 Priests, Tralee, for saying Masses for my soul. The money due  
 of Pat, James, and John Kearney, Cordal, is to be forgiven them,  
*i.e.*, the book debts. Should Tom P. Kearney die without an  
 issue, the house property willed him must be given back to  
 Tom John Kearney, and Tom James Kearney, of Cordal; Chapel  
 Lane to Tom John; the house I am living in to be given Tom  
 James Kearney. In case there is any deficit in making good the  
 amount willed and named, there is a promissory note of £225 due  
 of Messrs. T. Prendeville, J. Nolan, Jeremiah Roche, J.P., for

building creamery house, which can be distributed to make good amounts specified. If not wanted as specified, I will £100 of it for Tom John and Tom James sons' education, the balance of £125 to be given John Kearney, my brother.

*Barton, J.*  
1910.  
*KEARNEY*  
*v.*  
*KEARNEY.*

"Signed this 26th day of July, 1897.

"THOMAS KEARNEY,

"Castleisland.

"JEREMIAH NOLAN, Castleisland.

"THOMAS KEARNEY, junr."

The testator died 7th February, 1901, and letters of administration, with the will annexed, were, on the 13th May, of same year, granted to Julia Kearney, the widow of the deceased. She died in February, 1905, without having re-married, and letters of administration, *de bonis non*, were granted to the plaintiff.

Thomas Pat Kearney, the legatee mentioned in the will of testator, was the same person as the second attesting witness, whose name was subscribed as Thomas Kearney, junr. He was alive, but unmarried.

The principal question arising for decision was as to whether Thomas James Kearney and Thomas John Kearney were now jointly entitled to the houses at Castleisland, as the devise to Thomas Pat (described in will as Thomas P.) Kearney had been rendered null and void by reason of his being an attesting witness to the will.

*Michael Comyn* (with him *The Solicitor-General*), for Thomas John and Thomas James Kearney :—

The terms of the gift to Thomas Pat may be considered, 'so as to arrive at the intention of the testator, although the gift itself is void under section 15 of the Wills Act. The intention here is the same as if, in a devise of real estate, the testator had given an estate tail to Thomas Pat, with remainder to Tom John and Tom James. The words used in the will would, if the premises were real estate, have been sufficient to create an estate tail by implication in Thomas Pat Kearney, with a remainder over (*Fearne on Contingent Remainders*, vol. I., 386). The same principles of



*Barton, J.* construction apply to real as to personal estate: *Williams v. 1910. Lewis* (1). A remainder over after an estate tail which lapses, or is *KEARNEY* void, will be accelerated; *Lainson v. Lainson* (2). But acceleration *v.* is a question of intention: and although the gift to Tom John and *KEARNEY.* Tom James is not in form a remainder, it is so in effect, and should be accelerated so as to carry out the real intention of the testator. Words which, if applied to real estate, would be construed as an estate tail, will, if applied to personalty, be construed as an absolute gift; but this does not affect the present case, because a gift of personalty after an absolute gift which lapses is valid: *In re Lowman*; *Devenish v. Pester* (3); and the same reasoning holds good when the preceding gift, instead of lapsing, is void. The doctrine of acceleration is not confined to realty. It applies equally to mixed realty and personalty: *Jull v. Jacobs* (4); and to pure personalty: see *In re Townsend*; *Townsend v. Townsend* (5).

Assuming that the gift to Tom John and Tom James is an executory limitation, still the intention of the testator should be the governing principle of construction; and his intention clearly was, that the gift to Tom John and Tom James should be postponed only for the purpose of letting in the interest given to Thomas Pat. The rule as to acceleration could be applied in this case without any extension of principle. There is nothing in the principle itself which limits it to remainders. The intention might be equally clear that an executory devise should be accelerated. There is now no practical distinction between contingent remainders and executory devises.

[The following cases were also referred to:—*Whitehorne v. Best* (6); *Green v. Tribe* (7); *Goodright v. Jones* (8); *Hutton v. Simpson* (9); *Hodgson v. Ambrose* (10); *Dodds v. Dodds* (11); *Green v. Giles* (12).]

*A. M. Sullivan, K.C.* (with him *McElligott*), for Margaret

(1) 6 H. L. Cas. 1013.

(8) 4 M. & S. 88.

(2) 18 Beav. 1.

(9) 2 Vern. 722.

(3) [1895] 2 Ch. 348.

(10) 1 Douglas, 336.

(4) 3 Ch. D. 703.

(11) 10 Ir. Ch. R. 476; 11 Ir. Ch. R. 374.

(5) 34 Ch. D. 357.

(6) [1906] 2 Ch. 121.

(12) 5 Ir. Ch. R. 25.

(7) 27 W. R. 39.

Kearney, administratrix of the deceased testator, and his sole next-of-kin:—

*Barton, J.*  
1910.

KEARNEY  
v.  
KEARNEY.

Under the provisions of the Wills Act (section 15), Thomas Pat Kearney, being an attesting witness to the will, takes nothing; and the question then arises as to whether the gift over in favour of Tom John Kearney and Tom James Kearney is accelerated. Our contention is that it is not accelerated in consequence of the incapacity of Thomas Pat to take. *Jull v. Jacobs* (1) is distinguishable. *In re Townsend's Estate*; *Townsend v. Townsend* (2) really decides the question at issue here. It is uncertain whether the gift over will ever take effect; and, in the meantime, the subject-matter of the gift must be treated as undisposed of, and cannot be accumulated for the benefit of the persons contingently entitled under the executory gift over. See also *In re Clark*; *Clark v. Randall* (3); *Re Vernon*; *Garland v. Shaw* (4); *Fell v. Biddolph* (5). If the Court were to hold that Tom John and Tom James were to be treated as taking the property immediately, it would be giving them that which the testator did not intend them to have, except in the specified event of Thomas Pat Kearney dying without children, which event has not occurred, and may never occur. What section 15 of the Wills Act avoids is a gift to an attesting witness; but that avoidance, or invalidation, only extends to the gift to the "person attesting the execution"; and the gift, for purposes of construction, is not to be treated as eliminated from the will: *Aplin v. Stone* (6). The intention here of the testator most clearly is that the donees mentioned in the gift over are not to take during the lifetime of Thomas Pat, and are only to take in the event of his dying without children. Acceleration arises only where it is intended, and that was the principle of the decision in *D'Eyncourt v. Gregory* (7). The will is first to be construed, and the interests given are to be ascertained, and then section 15 of the Wills Act is to be applied. See judgment of Swinfen Eady, J., in *Aplin v. Stone* (6) at p. 548 of the Report.

*The Solicitor-General*, in reply.

(1) 3 Ch. D. 703.

(5) L. R. 10 C. P. 701, 709.

(2) 34 Ch. D. 357.

(6) [1904] 1 Ch. 543.

(3) 31 Ch. D. 72.

(7) 5 av. 36.

(4) 95 L. T. (N.S.) 48.

*Barton, J.*  
1910.

*KEARNEY*  
*v.*  
*KEARNEY.*

Nov. 28.

BARTON, J.:

The proper way of dealing with a case of this kind is, first, to construe the will, and ascertain what interests are given by it, and then to apply section 15 of the Wills Act.

In the present case we have a bequest of chattels real to Thomas Pat Kearney, with a gift over in the event of his dying without issue, to Tom John Kearney and Tom James Kearney. The effect was to give the entire interest of the testator in the chattels real to Thomas Pat Kearney, defeasible in the event of his dying without issue. In that event, but not otherwise, the gift to him was to be divested, and the gift over to operate.

Thomas Pat Kearney witnessed the will, with the result that the bequest to him is void by section 15 of the Wills Act. He is alive, and has not yet had any issue. It is contended on behalf of Tom John Kearney and Tom James Kearney, that the gift over is accelerated. That contention cannot, in my opinion, prevail.

This is not a life estate, followed by a remainder, in which case the remainder is accelerated by the removal, however it be brought about, of the life estate, as in *Jull v. Jacobs* (1).

In the present case the testator contemplated that in a certain future event the first gift was to be divested, and the gift over was to operate. Until it is ascertained whether that event occurs or not, it is uncertain whether the gift over will ever operate; and if that event does not take place, the gift over will never operate. If the happening had already been negatived, the gift over would not take effect, and the entire interest would, as the result of sect. 15 of the Wills Act, be treated as undisposed of: *McCarthy v. McCarthy* (2). For similar reasons, if at any future time the happening of that event be negatived, the gift over will never arise. What claim can the donees have to receive, or to have accumulated, intermediate income? They will be entitled to the chattels real in the event of Thomas Pat Kearney dying without issue. But until that event occurs the property must be treated, in the interim, as undisposed of, and if the happening of that event be negatived, it will be treated as altogether undisposed of.

R. W. L.

Thomas John and Thomas James Kearney appealed to the Court of Appeal.

*Appeal.*  
1911.

*The Solicitor-General and Serjeant O'Brien, K.C.* (with them *Michael Comyn*), for the appellants.

KEARNEY  
v.  
KEARNEY.  
Jan. 23.

*A. M. Sullivan, K.C.* (with him *McElligott*), for the respondent.

The Court (The Lord Chancellor, and Lords Justices Holmes and Cherry) affirmed the order of Mr. Justice Barton, and dismissed the appeal with costs.

Solicitors for Thomas John and Thomas James Kearney:  
*T. F. O'Connell & Son.*

Solicitor for Margaret Kearney: *R. C. Meredith.*

W. G.



Barton, J.  
1910.

## CALDBECK v. CALDBECK.

Oct. 10.

(1910. No. 708.)

*Will—Construction—Person in loco parentis—“Younger children”—Eldest son—Eldership carrying the estate—Portions—Distribution—Period of—Class when ascertained—Infant—Maintenance—Contingent interest—Right to surplus income and accumulations.*

By his will a grandfather devised an estate to his son W. for life, with remainder to his first and other grandsons (the sons of W.), successively, in tail male, with remainder, if no grandson attained twenty-one, to testator's granddaughter or granddaughters, or such of them as should attain twenty-one or marry, and if more than one, in equal shares as tenants in common in tail, with cross-remainders. And testator charged the estate in favour of grandchildren in these terms:—“For the younger children of my said son W., or such of them as shall attain twenty-one, or being daughters, shall marry before that age, that is to say, for one younger child the sum of £3000, for two younger children the sum of £4000, equally between them, and for three or more younger children the sum of £5000 in equal proportions.”

After the death of his grandfather and father; T., the first-born grandson, became tenant in tail male in possession of the estate and died in 1910, under age and unmarried. There survived him one brother, who thereupon became the tenant in tail male in possession, and two sisters. None of them had attained twenty-one or married.

The minors were wards of Court, and there was a sum of about £2300 in Court representing accumulations of interest on the portions-charge of £5000 provided by the will, which had been lodged by the receiver pursuant to order out of the rents and profits of the estate accruing since T. was in possession as tenant in tail male.

*Held:* (1) That the accumulations of interest upon the younger children's portions-charge, after providing for maintenance, belonged to the administratrix of T. (2) That T. had not qualified to receive a younger child's portion, because he had died before the period of distribution, and had been in the character of “eldest son” in possession of the estate; and that consequently no larger sum than £4000 could ever be raisable for the purpose of the younger children's portions.

The Court also declared that the sum presumptively raisable on foot of the portions-charge did not bear interest during the infancy and spinsterhood of the female minors, but only such annual allowance in lieu of interest as the Lord Chancellor might deem necessary for their reasonable maintenance.

*Barton, J.*  
1910.

CALDBECK  
v.  
CALDBECK.

By his will, dated the 13th March, 1891, Thomas Fulton Caldbeck devised his estate of Kilmashogue, in the county of Dublin (subject to a mortgage as therein mentioned) to his son William Eaton Caldbeck during his life, and after his death to the use of the first and other sons of his said son successively according to seniority of age in tail male with remainder in default of sons, to the use of the daughter or daughters of his said son William Eaton Caldbeck or such of them as should attain twenty-one, or be married, and if more than one, in equal shares as tenants in common in tail, with cross-remainders between them in tail with remainder over. And by his will testator charged his said estate of Kilmashogue with the following sums for the younger children of his said son William, or such of them as should attain twenty-one or, being daughters, should marry before that age, "that is to say, for one younger child the sum of £3000, for two younger children the sum of £4000 equally between them, and for three or more younger children the sum of £5000, in equal proportions."

Testator appointed his wife, Mrs. Charlotte Caldbeck, and his son William Eaton Caldbeck, trustees and executors of his will. He died on the 20th June, 1891, and his will was proved on the 14th July, 1891, by his son, William Eaton Caldbeck.

William Eaton Caldbeck died the 25th April, 1895, leaving his widow, Sara E. Caldbeck, and four infant children, Thomas Fulton Caldbeck, junior, born the 9th August, 1894, William Eaton Caldbeck, born the 24th May, 1896, Charlotte Hannah Caldbeck, born the 14th September, 1891, and Sara Frances Caldbeck, born the 2nd September, 1892, surviving him.

By Order of the Lord Chancellor, dated the 3rd July, 1901, the minors were made wards of Court, and guardians were appointed.

By order, dated the 8th July, 1902, the receiver appointed in the minor matter was ordered to lodge in Court to the credit of the matter and the separate credit "of a charge of £5000 provided

*Barton, J.* by the will of Thomas Fulton Caldbeck, deceased, for the younger  
 1910. children of William Eaton Caldbeck, deceased," the sum of  
 CALDBECK £1000, being interest at the rate of 4 per cent. up to the 25th April,  
 v. 1901, and the future gales of such interest as they should accrue.  
 CALDBECK.

Thomas Fulton Caldbeck, junior, died on the 30th April, 1910, under the age of twenty-one.

Letters of administration of the personal estate and effects of Thomas Fulton Caldbeck, junior, deceased, were on the 20th June, 1910, granted to his mother Sara E. Caldbeck.

At the date of the hearing of this application the accumulations of interest to the credit of the matter and the separate credit of the charge of £5000 aforesaid lodged in Court were represented by a sum of £2263 19s. 5d. new consols and £76 11s. 11d. cash.

By order of the Lord Chancellor, dated 11th July, 1910, it was ordered that Sara E. Caldbeck, as administratrix of Thomas Fulton Caldbeck, junior, should be at liberty to issue an originating summons in the Chancery Division for the determination of the following questions, viz. :—

1. As to what are the rights of the late Thomas Fulton Caldbeck, the younger, and his next-of-kin and the defendants, respectively, in the funds standing to the credit of the matter . . . and separate credit of a charge of £5000 provided by the will of Thomas Fulton Caldbeck, deceased, for the younger children of William Eaton Caldbeck, deceased, representing accumulations of interest on the said charge, after providing for the maintenance of the defendants.

2. Whether, in the events that have happened, any larger principal sum than £4000 can ever become raisable on foot of the said charge.

3. Who are now presumptively entitled to the principal sum that may be declared to be raisable on foot of the said charge, and in what proportions, and in particular whether the administratrix of the said Thomas Fulton Caldbeck, the younger, is entitled as such to any share thereof.

4. Whether the sum presumptively raisable on foot of the said charge bears during the infancy and spinsterhood of the female defendants interest or only such annual allowance in lieu

of interest as the Lord Chancellor may deem necessary for their reasonable maintenance. Barton, J.  
1910.

CALDBECK

*Garrett Walker, K.C.*, for the plaintiff administratrix of CALDBECK.  
Thomas Fulton Caldbeck, junior.

The administratrix of the deceased minor is entitled to share in the charge provided for younger children in conjunction with his two sisters, and the charge presumptively raisable is one of £5000. The principle established by the cases as regards provision made by persons *in loco parentis* is, that no child is to be left unprovided for, and that a first-born son who does not fill the capacity of eldest son in enjoyment of the estate at the period of distribution, is to be treated as one of the class of younger children, and entitled to share in the portions of such. See the observations of Lord Hatherley in *Collingwood v. Stanhope* (1).

Only one child can be excluded. It has been suggested that the deceased minor and the minor who is the present owner should both be excluded from sharing in the portions fund.

In the present case, in the events that have happened, the period fixed for distribution as regards the charge for portions is the time when one of the female minors attains twenty-one, or marries, which period has not yet arrived. We submit that only one of the children can be excluded as *eldest* son, and that is the present tenant in tail in possession. The minor, Thomas Fulton Caldbeck, never filled, or could fill, the character of *eldest* son, because he died before the period of distribution, and consequently he will not be excluded from the class of younger children and his representative is entitled to share. Sir Andrew Porter, M.R., appears to have decided in *Morton's Trusts* (2) that two sons could not be excluded as *eldest* sons; and, in deciding that the elder boy, who had died before attaining twenty-one, was excluded because he had been, though an infant, in perception of the rents and profits of the estate at the period of distribution, and that the second son who succeeded to the estate on the death of his brother was one of the

(1) L. R. 4 H. L., at p. 52.

(2) [1902] 1 Ir. 310, note.



*Barton, J.* class of younger children, he says that *Ellison v. Thomas* (1) was clear authority that if this second son were held excluded the personal representative of the elder boy when raised, though he died under twenty-one, would be entitled to share in the portions for younger children.

1910.  
CALDBECK  
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As to the accumulations of interest—so far as the sum lodged in Court as representing interest on the portions-fund has not been required or actually applied for the maintenance of the minors presumptively entitled, it belongs to those whose funds have provided it, and that in the present case would be the owner for the time being of the estate, viz., the deceased minor, subject to this consideration that the Court can resort to the accumulated interest of past years for present or future requirements in the way of maintenance. *Bowlby v. Bowlby* (2) shows that, in a case like the present, an infant does not acquire an immediate vested interest in the income of the contingent legacy; and, if the infant dies, the surplus income not applied for maintenance does not pass to his or her representatives; and at p. 708, Romer, L.J., says:—“And in the case of the child dying under twenty-one, the surplus ought to go to those whose funds have provided it, seeing that the interest was only payable for maintenance.” See also Simpson on Infants, p. 228: *Jones v. Graves* (3).

*R. W. Lucas*, for William Eaton Caldbeck, the tenant in tail in possession.

The administratrix of the deceased minor is not entitled to share in the charge for younger children, and the inheritance cannot in any event be saddled with a charge exceeding £4000.

The facts of *Morton's Trusts* (4) are not the same as this case, for Pierce Edward Morton, the first-born son, though he died under age, survived the period of distribution. That period in this case has not yet come. All Sir Andrew Porter says is, that if he decided differently from what he *does* decide, *Ellison v. Thomas* (1) would be authority for holding that the first-born son was not excluded

(1) 1 De G. J. & Sm. 18.

(2) [1904] 2 Ch. 685.

(3) [1900] 2 Ch. 683.

(4) [1902] 1 Ir. 310, note.

from sharing in the portions-fund. At most his observations are no more than a *dictum*, and not supported by *Ellison v. Thomas* (1), because in that case Richard Creswell, the younger, though he died before the period of distribution, had attained twenty-one, when the right to the portion became vested.

*Barton, J.*  
1910.

CALDBECK  
v.  
CALDBECK.

The matter is concluded by authority. In *Lord Teynham v. Webb* (2), the elder son was an infant in possession of the estate; but he died under age and before the period of distribution, and it was held that he was excluded from the class of younger children. That is this case. To the same effect is *Davies v. Hugenin* (3). These two decisions were cases of provisions for children as *portions*, and of course when a date for vesting is specifically fixed (as here) the case is an *a fortiori* one.

The period of distribution is when the first minor becomes entitled, and the class then opens up to let in any other one answering the description. In this case the deceased minor never qualified to be included in the class, as the portions are payable only to younger children who, being sons, attain twenty-one, or, being daughters, attain that age or marry.

See also *Swinburne v. Swinburne* (4); *Butler v. Duncomb* (5). In *Remnant v. Hood* (6), the question as to whether the representatives of deceased infant daughters were entitled to share in a portion-charge arose, but was not decided by the Court; but the matter was a question of the time of vesting, and the opinion of Turner, L.J., is very clear on the matter that twenty-one or marriage would be held to be the period of vesting of portions.

On the second question we adopt the contention of Mr. Walker.

*Longfield*, for the minor defendants, Charlotte Hannah Caldbeck and Sara Frances Caldbeck:—

Owing to the decision in *Bowlby's Case* (7), we are not in a position to contend successfully that the administratrix of the deceased minor is not entitled to the accumulations representing

(1) 1 De G. J. & Sm. 18.

(2) 2 Ves. Sm. 197.

(3) 1 H. & M. 730.

(4) 17 W. R. 47.

(5) 1 P. W. 448.

(6) 2 De G. F. & J. 396.

(7) [1904] 2 Ch. 685.

*Borton, J.* past income of his estate, which was the property which provided  
 1910. the accumulations; but such right is subject to the right of my  
*CALDBECK* clients (the two infant daughters) to resort to this fund for arrears  
*v.* of past maintenance or future maintenance as the Court may direct.  
*CALDBECK.* See also *Jones v. Greaves* (1) as to the rights of infants to main-  
 tenance in the case of contingent interests settled on them by a  
 person *in loco parentis*.

As to the second question, the only two minors who can qualify for inclusion in the class of "younger children" are the two daughters, because in the events which have happened the surviving brother has become entitled to the estate, and the period for the distribution of the portions-charge has not arrived.

BARTON, J. :—

Two questions have been discussed in the course of the arguments, which proceeded upon the assumption that the testator placed himself *in loco parentis* towards these grandchildren.

The first question relates to the money in Court, which represents surplus accumulations of interest upon the younger children's portions-fund, after providing for maintenance. I am of opinion that, to quote Romer, L.J.'s, words in *Bowlby v. Bowlby* (2), it goes to the person "whose funds provided it." That person was Thomas Fulton Caldbeck, junior, who, down to his death in 1910, was tenant-in-tail in possession of the Kilmashogue estate. His administratrix, who is the applicant upon the summons, is now entitled to the money in the Court.

The second question is, whether any larger sum than £4000 will ever be raisable for younger children's portions. That question must, in my opinion, be answered in the negative. Thomas Fulton Caldbeck, junior, has died under age. The portions were to be raised for younger children who, if sons, should attain twenty-one. He has died before the period of distribution has arrived. Besides, he was, down to his death, in the character of "eldest son," in possession of the Kilmashogue estate as tenant-in-

(1) [1900] 2 Ch. 683.

(2) [1904] 2 Ch. 685.

tail in possession. By virtue of his "eldership" his administratrix has just been declared entitled to the surplus interest upon the younger children's portions-fund. Can she, after reaping the fruits of his "eldership," claim a portion on the basis that he was a younger child? I have heard no authority that would support such a proposition. This is not a case like *Ellison v. Thomas* (1), where the trust was for all the children except the eldest son *for the time being*, which was held to mean at the time of the raising of the money. There could not be more than one person excepted by those words. In that case the eldest son died after attaining majority, and without ever having obtained possession of the estate. Mr. Garrett Walker relied upon a passage in a judgment of the late Master of the Rolls in *Morton's Trusts* (2), which rested upon the authority of *Ellison v. Thomas* (1). *Ellison v. Thomas* (1) differs so widely from the present case that I cannot regard the passage which he cited as having any direct bearing upon the questions which arise upon this summons. There are no words in this will which would indicate that it was intended that only one child should be excluded from the class of younger children, and I do not think that the words of the will contemplate that the personal representative of an elder son, who, as such, enjoyed possession of the estate down to his death, should share in younger children's portions. I have no difficulty in holding that no more than £4000 will ever be raisable for the purpose of younger children's portions.

*Burton, J.*  
1910.  
*CALDBECK*  
*v.*  
*CALDBECK.*

The Court made the following order :—

"That the applicant is entitled as personal representative of Thomas Fulton Caldbeck the younger, aforesaid, to the funds standing in the books of the Accountant-General to the credit of the matter, . . . and separate credit of a charge of £5000 provided by the will of Thomas Fulton Caldbeck, deceased, for the younger children of William Eaton Caldbeck; and it is further ordered and declared that in the events that have happened no larger principal sum than £4000 can ever become raisable on foot of the said charge; and it is further declared that the defendants Charlotte Hannah Caldbeck and Sara Frances Caldbeck are now presumptively entitled thereto in equal

(1) 1 De.G. J. & S. 18.

(2) [1902] 1 Ir. 310, note.



*Barton, J.*  
1910.

CALDBECK

v.

CALDBECK.

proportions, and that the applicant is not entitled as such administratrix as aforesaid to any part thereof, and it is further declared that the sum presumptively raisable on foot of the said charge ~~does not~~ bear interest during the infancy and spinsterhood of the said Charlotte Hannah Caldbeck and Sara Frances Caldbeck, but only such annual allowance in lieu of interest as the Lord Chancellor may deem necessary for the reasonable maintenance of the said Charlotte Hannah Caldbeck and Sara Frances Caldbeck during their infancy and spinsterhood."

Solicitors for the plaintiff, the administratrix of T. F. Caldbeck, jun.: *Hogan & Son.*

Solicitors for the defendant Wm. Eaton Caldbeck : *A. H. Middleton & Son.*

Solicitor for the defendants the Misses Caldbeck : *G. B. Pilkington.*

R. W. L.

IN THE MATTER OF THE ESTATE OF CATHERINE  
LLOYD, DECEASED; SUSANNA M. WATERS *v.*  
DEBORAH MARY LLOYD (1). *Appeal.*  
1910.  
Dec. 12.

*Mortgage—Acknowledgment—Statute of Limitations—3 & 4 Wm. 4, c. 27,  
ss. 2, 40; 37 & 38 Vict. c. 57, ss. 1, 8.*

A claim by a legal mortgagee for payment of principal and interest due on his mortgage, brought in in a suit for the administration of the real and personal estate of a deceased owner of the equity of redemption, is a proceeding to recover money secured by a mortgage charged upon or payable out of the land, within sect. 8 of the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), and not an action or suit to recover the land, within sect. 1 of that Act, and consequently the mortgagee in such case can rely upon an acknowledgment of his right given in writing by the agent of the owner of the equity of redemption, as keeping alive a mortgage debt, which would otherwise have become statute-barred.

APPEAL by the Scottish Amicable Life Assurance Society from an order of Barton, J., dated 8th November, 1910.

By an indenture of mortgage, dated the 5th day of May, 1865, Horatio Michael Lloyd mortgaged certain freehold lands in the county of Tipperary to the appellants, the Scottish Amicable Life Assurance Society, to secure the repayment of £1200 with interest at £6 per cent. per annum. The equity of redemption in the said lands afterwards became vested in Catherine Lloyd, who, in the year 1877, paid to the Society the sum of £200 on account of the said principal sum of £1200. No interest on the said mortgage was paid subsequent to the 5th day of May, 1894; but on the 25th day of March, 1898, a letter, which amounted to an acknowledgment of the mortgage debt within section 8 of 37 & 38 Vict. c. 57, was written by an agent of Catherine Lloyd to the Society. The present action was

(1) Before THE LORD CHANCELLOR, and LORDS JUSTICES HOLMES and CHERRY.

*Appeal.* instituted by a creditor of the said Catherine Lloyd (then deceased)  
 1910. — in the year 1909, to administer her real and personal estate, and  
*WATERS* the Society having claimed to rank as incumbrancers on the real  
*v.* estate in respect of their mortgage, the chief clerk on the 9th day  
*LLOYD.* of July, 1910, filed his certificate in the action, whereby (*inter alia*) it was found that there was due to the Society on foot of the said mortgage, and as an incumbrance on the real estate of the deceased, the sum of £1000 for principal, together with £431 6s. 6d. for interest thereon from the 14th day of December, 1902, to the date of the certificate, and £2 for costs of claim. By an order of Mr. Justice Barton, dated the 8th day of November, 1910, and made on the application of the defendant in the action to vary the chief clerk's certificate, it was ordered that the said certificate should be varied by disallowing the said debt certified to be due to the Society, but that the Society should be at liberty to send in particulars of any claim which they might be advised to make against the personal estate of the deceased, and to apply to the chief clerk for a separate certificate upon any such claim. From this order the Society now appealed.

*Ronan, K.C., and H. Wilson, K.C., for the appellants:—*

We contend that the claim of the appellants on foot of their mortgage was not an "action or suit to recover any land" within section 1 of 37 & 38 Vict. c. 57, but merely a proceeding to recover the moneys secured by the mortgage within section 8 of that Act; and consequently we are entitled to rely on the acknowledgment which was admittedly given, as keeping the debt alive.

No doubt a foreclosure suit is one to recover the land itself, and therefore comes within section 1: *Wrixon v. Vize* (1); *Heath v. Pugh* (2); *Harlock v. Ashberry* (3); but the remedy of foreclosure, which is unknown in Ireland, is essentially different from that sought by the appellants in the present case, *viz.* payment of their debt out of the proceeds of the sale of the mortgaged lands

(1) 3 Dr. & War. 104.

(3) 19 Ch. D. 539.

(2) 6 Q. B. D. 345.

*Bruce v. Brophy* (1); *Sinton v. Dooley* (2). Section 25 of the Conveyancing and Law of Property Act, 1881, enabling a sale of mortgaged property to be had in an action for foreclosure, was expressly not extended to Ireland, the Legislature thereby recognizing the distinction in the practice existing in the two countries: compare also English Order LV. (5A) with the corresponding Irish Order LV. (7), from which relief by foreclosure is expressly excluded. In *Stinson's Estate* (3), *Monroe, J.*, held that a petition for sale in the Land Judge's Court by an incumbrancer on land is a proceeding to recover money charged on the land within section 8: *In re Matthew's Estate, M'Caul, Petitioner* (4); *Beamish v. Whitney* (5). The distinction between the remedy of a mortgagee against the mortgaged lands and his personal remedy is clearly pointed out by *Romer, J.*, in *Kibble v. Fairthorne* (6). [They also referred to *Averall v. Wade* (7); *Hughes v. Kelly* (8); *Conlan's Estate* (9); *Irish Land Commission v. Davies* (10).]

*Appeal.*  
1910.

WATERS  
v.  
LLOYD.

*S. L. Brown, K.C., Carrigan, K.C., and Poole*, for the respondent:—

We submit that the order appealed from was right in principle and should not be disturbed. The appellants rely on the acknowledgment given by the agent of the owner of the equity of redemption, but this case comes within section 1 of 37 & 38 Vict. c. 57, and not section 8. The latter section cannot be relied upon, as there was here no "charge" upon or payable out of the lands, which is sought to be recovered, the charge having become barred by non-payment of any part of the principal or interest for upwards of twelve years. This is a proceeding in the nature of a suit for the recovery of the land itself; see judgment of *Porter, M.R.*, in *Barcroft v. Murphy* (11);

(1) [1906] 1 Ir. R. 611.

(2) [1910] 2 Ir. R. 162, at p. 164.

(3) 29 L. R. I. 490.

(4) 38 I. L. T. R. 246.

(5) [1908] 1 Ir. R. 38; [1909]

1 Ir. R. 360.

(6) [1895] 1 Ch. 219, at p. 224.

(7) Ll. & G. temp. Sugden, 252.

(8) 3 Dr. & War. 482.

(9) 29 L. R. I. 199.

(10) 27 L. R. I. 334.

(11) [1896] 1 Ir. R. 590, at p. 596.



*Appeal.* *Shea v. Moore* (1), and there is no real distinction between this attempt to raise the mortgage debt out of the lands (the right of the mortgagees to which is absolutely extinguished by section 34 of 3 & 4 Wm. 4, c. 27) and a foreclosure suit, which admittedly is one to recover the lands themselves: *Heath v. Pugh* (2). In the one case the lands are delivered to the purchaser through the Court, in the other to the mortgagee, but in either case it is the lands that are made available for the payment of the mortgage debt. "The Irish practice" (it is laid down in Burroughs & Gresson, p. 31), "which appears much more conducive to the interest both of the debtor and creditor, is, to decree, *not a foreclosure only*, but also a sale of the mortgaged premises, or of a competent part to pay the demands decreed."

*Ronan, K.C.*, in reply, referred to *Hunter v. Nockolds* (3).

#### THE LORD CHANCELLOR:—

This appeal from Mr. Justice Barton raises a somewhat important question on the law and practice in Ireland in the realization of money secured by mortgage.

The action is one for the administration of the real and personal estate of Catherine Lloyd, instituted by a creditor of the deceased against her executrix.

Accounts were directed of the real and personal estate, and the usual inquiry for incumbrancers on the real estate was ordered.

The certificate of the chief clerk found the real estate to consist of the freehold lands of Skehana and of the lands of Poulmonday, and it stated in the fourth schedule as an incumbrance affecting Skehana a mortgage dated the 5th May, 1865, made by Horatio Michael Lloyd to the Scottish Amicable Assurance Society, and that there was due thereon for principal the sum of £1000, and for interest £431 6s. 6d., and that this mortgage was first in priority.

(1) [1894] 1 Ir. R. 158.

(3) 1 Mac N. & G. 640.

(2) 6 Q. B. D. 345.

Two other mortgages on the same lands were also found by the same certificate. The Company had sent in a claim to rank as incumbrancers on the lands on foot of this mortgage in answer to a posting for incumbrancers.

The defendant applied to Mr. Justice Barton to have this certificate varied in the manner afterwards directed by Mr. Justice Barton's order, and the learned Judge by order, dated 8th November, 1910, directed that the certificate should be varied by disallowing the debt of £1431 6s. 6d., certified to be due to the Scottish Amicable Assurance Society, but that they should be at liberty to make a claim against the personal estate of the mortgagor. The Society has appealed against this order, and asks for a declaration that the appellants have a valid and subsisting incumbrance for the amount certified, and should have liberty to proceed against the real estate for the amount due to them on foot of the covenant contained in their mortgage.

The ground of the judgment delivered by Mr. Justice Barton is, that he regards the claim, not as a mere claim to recover the money, but rather as a claim in the nature of foreclosure against the lands. "The order, the postings, and the claim are all directed at or against the lands; and the meaning of the claim," he says, is "that the incumbrancer wishes to avail himself of the machinery of the Court for realizing his security by sale of the lands in default of payment. If I am right in that view," he adds, "there is no proof of any acknowledgment sufficient to satisfy section 14 of the 3 & 4 Wm. 4, c. 27."

The effect of this order is to destroy the existence of this mortgage not only as a security upon which an action of foreclosure could, in England at all events, be brought, but also as a charge on the land. I do not think that is the legitimate result of any of the Statutes of Limitation, or any decision upon them.

We must take it as established that an action of foreclosure in England is an action to recover the land, as there is recovered in such action by the mortgagee the equity of redemption, and being, therefore, one of the classes of actions in which the land is recovered, it is within the 1st section of the 3 & 4 Wm. 4, c. 27, and the amending Acts, 7 Wm. 4 & 1 Vict. c. 28, and the Act of 1874, 37 & 38 Vict. c. 57; and I assume for the purposes of this case

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that such action of foreclosure would be here barred, and that no acknowledgment within section 14 has been proved. But it does not follow that the charge of which section 40 of the one Act and section 8 of the other speak is also done away with.

Section 2 and section 40 of the Act do not deal with the same subject-matter. The first refers to the land, or an estate or interest in it, and the other to charges on land. Section 8 of the Act of 1874, the one now governing the matter, provides as follows:—

[His Lordship read the section, and continued.] Now, here an acknowledgment has been given sufficient within that section, and the section involves, I think, a declaration that such an action, suit, or proceeding may be brought to recover a sum of money secured by mortgage, and there also exists, I think, the ordinary remedy resorted to in Ireland of a proceeding to sell and realize the mortgage, whether in the Landed Estates Court under a definition of “incumbrance” in the Landed Estates Act, or in Chancery by the direction to have such a sale. The remedy by sale is quite distinct in character and consequences from an action of foreclosure. In Ireland by a sale there is recovered only the money, and the surplus proceeds belong to the mortgagor.

By foreclosure the equity of redemption passes to the mortgagee. He gets the subject-matter *in specie* for his debt. There is no right of sale in England, unless so far as it is given by the 25th section of the Conveyancing Act, which does not extend to Ireland, where it was not wanted.

Section 34 does not destroy, I think, the express remedy given by section 40, where, at all events, as here, that is a living right. Section 34 is an apt supplement to the sections which deal with the recovery of the land.

Section 42, which deals with the arrears of interest recoverable out of the land, is *in pari materia* with sec. 40; and in *Blennerhassett's Estate* (1) we applied that section to proceedings against the land under sales, and held only six years' arrears of interest recoverable. Till foreclosure absolute takes place the mortgagee remains what

(1) *Ante*, p. 16.

he always was in a Court of Equity, a mere incumbrancer holding a security for a debt : see *per* Lord Selborne in *Heath v. Pugh* (1).

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It has been (correctly I think) held by Mr. Justice Monroe that a petition for sale in the Landed Estates Court is a proceeding to recover a sum of money charged on land within the meaning of the 8th section of the Real Property Limitations Act, 1874 : *Stinson's Estate* (2). I see no ground for depriving the appellants of that remedy under their mortgage, though they might not be able to bring an action of foreclosure.

I think the order of Mr. Justice Barton should be discharged, and an order made declaring that the mortgage vested in the appellants mentioned in the 4th schedule to the certificate of the Chief Clerk is a subsisting incumbrance upon the lands comprised in the mortgage.

The respondent must pay the costs of the appeal, and also the sum of £5 5s. directed to be paid by the appellants by Mr. Justice Barton's order if the payment has been enforced. They must also pay the costs of the hearing of the motion before Mr. Justice Barton.

HOLMES, L.J. :—

Although counsel for the appellants and the respondent have supplied the Court with the result of much learning and research, the decision of the matter in controversy depends upon the effect to be given to two clearly drafted sections of the Real Property Limitation Act, 1874, taken in connexion with the rights of mortgagees as well settled by law and practice in Ireland.

The Scottish Amicable Life Assurance Society lent money to Horatio Michael Lloyd, the repayment of which was secured by a mortgage on real estate, the property of the borrower, dated the 5th May, 1865. The equity of redemption subsequently became vested in Catherine Lloyd, on whose death this suit for the administration of her real and personal estate was brought by a creditor. The usual reference to Chambers having been made, the Assurance

(1) 6 Q. B. D. 359, 360.

(2) 29 L. R. Ir. 490.



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Society claimed to have an incumbrance on the real estate under the mortgage; and the Chief Clerk, having allowed the claim, certified that the sum of £1431 6s. 6d. for principal and interest is due in respect thereof. This finding was varied on the application of the defendant by the order appealed from, the effect of which is to declare that the mortgage debt is not now an incumbrance on the real estate. It is admitted that no part of the principal or interest due on the mortgage was paid within twelve years before the appellants' claim; but it is also admitted that following the words of section 8 within that period an acknowledgment of the right thereto had been given in writing, signed by the agent of the person by whom the same was payable to the appellants' agent. In these circumstances section 8, which I have mentioned, is *prima facie* applicable. That section enacts that no action or suit or other proceeding shall be brought to recover any sum of money secured by any judgment or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twelve years next after a personal right to receive the same shall have accrued to some person capable of giving a discharge therefor, unless in the meantime some part of the principal money or some interest thereon shall have been paid, or some acknowledgment of the right thereto given in the manner specified, a condition which, as I have said, is admitted to have been fulfilled. This language implies that where there has been the payment or acknowledgment given, an action, suit, or other proceeding may be brought, and this is made absolutely clear by the words that follow—"In such case, no such action or suit or other proceeding shall be brought but within twelve years after such payment or acknowledgment."

I believe that no one would question this proposition, were it not for section 1 of the Act, which declares that "no person shall make an entry or distress, or bring an action or suit to recover any land or rent but within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued." This period of twelve years may be prolonged by means of an acknowledgment of title given to and by the persons specified, and in the manner prescribed by

section 14 of 3 & 4 Wm. 4, c. 27, passed in 1833, but this provision does not help the appellants, as it is admitted that there has been no acknowledgment fulfilling the terms of this section. It is therefore argued that, the twelve years mentioned in sect. 1 of the Act of 1874 having expired, no action or suit to recover the mortgaged land can now be brought, and that by section 34 of the Act of 1833, the right and title of the appellants to these lands have been extinguished. The answer to this argument is to be found in the nature of the proceedings by which the payment of mortgage debts is enforced in Ireland. The remedies given by the well-settled law and practice of this country to mortgagees, differ in one essential feature from those usually adopted in England. In both countries, the mortgagee is entitled to gain possession of the land by an action of ejectment or otherwise; but as the mortgagor may years afterwards bring a suit to redeem the mortgage, in which the mortgagee must account for the rents and profits he has received, this is a course rarely resorted to. In England, the usual remedy of the mortgagee is an action to foreclose, the judgment in which makes him the absolute owner of the mortgaged lands if the mortgagor does not redeem within a limited period. I understand that this is the course taken, not only by the first mortgagee, but also by mortgagees of the equity of redemption who undertake to redeem the earlier mortgages, and even by a person whose right as mortgagee arises from a deposit of the title-deeds of the lands. In these cases the lands themselves become the property of the foreclosing mortgagee; and they seem to me to be actions or suits to recover land within the meaning of the 1st section. In Ireland foreclosure is unknown. The mortgagee who desires to put an end to the mortgage takes proceedings to obtain, not the mortgaged land, but the money secured by it. The judgment he seeks is that the lands be sold by the Court, and that all persons interested therein be paid out of the proceeds in due priority. This Court recently considered the effect of this mode of procedure in connexion with the arrears of interest which a mortgagee was entitled to be paid out of the purchase-money of the mortgaged property; and as far as we could ascertain, sale of the lands, by the Court of Chancery, and in later times by the

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Landed Estates Court, has in Ireland always taken the place of foreclosure in England. Mr. Ronan has called our attention to a remarkable legislative recognition of the difference of practice in the two countries which is to be found in section 25 of the Conveyancing and Law of Property Act, 1881. This section, which authorizes the Court to direct a sale of the property in foreclosure and redemption suits, ends with the provision that it does not extend to Ireland, which can only be accounted for by the fact that the settled practice in this country made it unnecessary. Now, while an English foreclosure action may be properly described as an action to recover land, a proceeding taken by an Irish mortgagee to realize his charge by selling the lands subject thereto, is not so. It is, in the words of section 8, an action, suit, or other proceeding to recover money secured by a mortgage, similar to a proceeding to realize a lien for unpaid purchase-money or any other sum charged upon or payable out of land. If there had been no suit for the administration of Miss Lloyd's assets, and the Assurance Society at the time when it sent its claim to the chief clerk had filed a petition in the Landed Estates Court for the sale of the mortgaged lands, I am satisfied that this would have been a proceeding, within the meaning of the 8th section, to recover the money secured by the mortgage, and the acknowledgment would have prevented it from being barred. The claim was a proceeding of the same character; and the result would have been similar in both cases. The Landed Estates Court would have sold the lands, and distributed the purchase-money to the persons interested therein, including, of course, the appellants. So, too, if Mr. Justice Barton had not disallowed the claim, there would have followed a sale and distribution of the purchase-money to the appellants who had the first mortgage thereon, and all other persons interested therein.

I would gather that Mr. Justice Barton must have held that all proceedings to recover a mortgage debt were actions to recover the land mortgaged, and that he must also have been of opinion that section 8, in so far as it relates to a mortgage, was confined to an action on the contract to pay, resulting in a

personal judgment against the defendant. Taking the words of the section, I am unable to see how this can be so in the case of a mortgage when it is certainly not so in the case of other charges upon lands, such, for example, as a legacy. Mr. Ronan has, I think, shown clearly, by authorities which it is unnecessary for me to refer to, that this is not the true construction of the section. The conclusion at which I have arrived is based on the language of the sections 1 and 8, and on the Irish law and practice relating to mortgages. It is possible that language is to be found in some reported judgments inconsistent with my view of the law. Perhaps the strongest expression of opinion in that direction is that of Porter, M.R., in *Barcroft v. Murphy* (1), but these observations do not bind this Court, and I do not agree with them. I ought to say in conclusion that I cannot accept Mr. Brown's proposition that the result of our allowing the appeal would be to re-establish the mortgage, so as to enable the mortgagee to recover the lands by ejectment. It would not have this effect, for the simple reason that this would be an action within section 1. There is, however, in my opinion, no objection to appoint a receiver over the rents pending the sale, as this is a right to which any incumbrancer is entitled if it is necessary to keep down the interest on his incumbrance.

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CHERRY, L.J. :—

I have come to the same conclusion, though, I must confess, after considerable hesitation. I was greatly impressed with Mr. Brown's argument that, inasmuch as the right of the mortgagees to enter into possession, or bring a foreclosure action, is in the present case clearly barred by the 1st section of the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), and inasmuch as their right and title to the land has been consequently extinguished by the 34th section of 3 & 4 Wm. 4, c. 27, the mortgage cannot be treated as a subsisting incumbrance affecting the land. But on a careful consideration of the matter I do not see that there is any difficulty in holding that although mortgagees have been

(1) [1896] 1 I. R. 596.



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divested of the legal estate, as decided by Romer, J., in *Kibble v. Fairthorne* (1), they may still possess all remedies for the recovery of the money secured by the mortgage other than foreclosure and the right to enter into possession. There can be no doubt that mortgagees are within sect. 40 of 3 & 4 Wm. 4, c. 27, and sect. 8 of 37 & 38 Vict. c. 57, and although incidentally they have been held also to come within the 2nd section of the earlier statute (for which the 1st section of the Act of 1874 is now substituted), I think that the operation of the latter sections must be limited to depriving them, after the lapse of the statutory period, of the legal estate in the lands and all right to recover possession. If, as argued by the respondents here, they were thereby deprived of all their remedies against the land, why should mortgages be mentioned at all in the 40th section of 3 & 4 Wm. 4, c. 27, or the 8th section of 37 & 38 Vict. c. 57? These sections cannot be held to apply to the personal remedy on the covenant only. In the case of an incumbrance created by way of lien or charge only, where no estate was ever vested in the owner of the incumbrance, they must also apply as regards remedies against the land. Why should a mortgagee who has merely been deprived of the legal estate and of the right to recover possession of the land, be in a worse position than, say, the owner of a legacy charged upon the land by will?

Solicitors for the appellants: *Carson & M'Dowell.*

Solicitor for the plaintiff: *M. L. Horan.*

Solicitor for the defendant: *J. P. Carrigan.*

R. ST. J. C.

(1) [1895] 1 Ch. 219.

IN RE FARIS, DECEASED; GODDARD *v.* OVEREND.

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1911.

Jan 19, 20.

*Will—Construction—Legacy—Mortgage—Charge—Company—Shares—  
Allotment of, by way of bonus—Accretion to subject-matter of legacy.*

A testatrix bequeathed to A, B, and C, “my one hundred and seventy pounds, G. & Co. Ordinary Stock.” Between the date of the will and of her death, a bonus of one new share for each original share was distributed to the shareholders of G. & Co. and converted into stock. The result of this distribution was to reduce the stock in G. & Co. to half its original value, so that the holding of £340 stock, consisting of her original shares and of the bonus, of which the testatrix died possessed, was worth no more than her original holding of £170 stock would have been.

*Held*, that the £340 stock passed under the bequest of “my one hundred and seventy pounds stock.”

A testatrix made a bequest in the following terms:—“As to the charge affecting the D estate . . . of which only £1000 is disposable under the terms of my marriage settlement, I direct that my executor shall hold it in trust” for certain persons in certain shares, which she thereby declared. Under her marriage settlement she had power to dispose of a sum of £1000, part of a charge of £1500.

*Held*, that interest due to the testatrix at her death upon the charge did not pass to the legatees under the terms of the bequest.

A testatrix devised and bequeathed to G, E, and F, her two mortgages for £1000 and £900 respectively, then affecting certain estates, for their own use absolutely in equal shares, share and share alike.

*Held*, that interest due to the testatrix under the two mortgages at her death passed with the principal to the legatees.

ORIGINATING SUMMONS taken out by the executor of the deceased to determine (*inter alia*) the following questions arising on the construction of the will:—

(1) Whether in the events that have happened the legacy to Harrie Overend of a share of £170 Guinness & Co. Ordinary Stock and £500 Government Stock has lapsed, and, if not, who is entitled to same.

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(2) Whether a sum of £340 Guinness & Co. Ordinary Stock to which the testatrix was entitled at the time of her death passes under the bequest of £170 Guinness & Co. Ordinary Stock.

(3) Whether the bequests of the mortgages for £1000 and £900 affecting the estates of Cecil B. Whyte and Petronella Whyte, and of the charge affecting the Donard estate, include any arrears of interest due in respect of the said mortgages or charge respectively at the death of the testatrix, and, if not, who are or who is now entitled to the said arrears?

The bequest referred to in questions (1) and (2) was as follows:—

“I give and bequeath to my nieces, Mary and Harrie Overend, and my nephew, John Overend, all of 35 Upper Baggot Street, Dublin, my one hundred and seventy pounds Guinness & Co. Ordinary Stock, and my five hundred pounds 2½ per cent. Government Stock, for their own use absolutely, in equal shares, share and share alike.”

Harrie Overend predeceased the testatrix, dying in or about the month of June, 1909. At the date of the will the testatrix was the owner of £170 Ordinary Stock in Arthur Guinness, Son, & Co., Ltd. In September, 1908, the Company declared a bonus on their Ordinary Stock. The means by which this bonus was paid to the shareholders was by allotting to each Ordinary Stockholder an additional amount of Stock equal to the amount of Stock already held by him or her. The amount of the bonus so allotted to the testatrix in the form of Ordinary Stock was £170, thus increasing her previous holding of £170 Ordinary Stock up to £340 Ordinary Stock, of which she was possessed at the time of her death. The nature of the transaction sufficiently appears from the circular sent out to the several stockholders on the occasion of the additional allotment. The circular sent to the testatrix was in the following terms:—

Registered Holding of Ordinary Stock

on 18th of August, 1908.

£170.

67, LOMBARD STREET, LONDON, E.C.,

14th September, 1908.

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SIR OR MADAM.

ARTHUR GUINNESS, SON, &amp; COMPANY, LTD.

By special resolution, confirmed at the Extraordinary General Meeting of the Company, held on the 31st day of August, the Capital of the Company was increased by the creation of 2,500,000 New Ordinary Shares of £1 each, and at such meeting it was resolved:—

“(1) That this General Meeting hereby sanctions the declaration and payment out of the Reserve Fund of a bonus, without deduction of income tax, at the rate of 100 per cent. on the £2,500,000 Ordinary Stock of the Company to the members, who on the 18th day of August, 1908, were registered as the holders of the Ordinary Stock; and (2) that the bonus declared by this meeting be paid by the distribution and allotment of the 2,500,000 New Ordinary Shares in the Capital of the Company, credited as fully paid up, ranking for dividend as from and after the 30th day of June, 1908, rateably and on equal footing with the said £2,500,000 Ordinary Stock, and that a sum equal to the amount of such bonus be transferred from Reserve Fund to Capital Account, and be capitalized accordingly.

The 2,500,000 New Ordinary Shares of £1 each have by resolution of the Board been converted into Ordinary Stock, and a certificate of the New Ordinary Stock is accordingly enclosed in payment of the aforesaid bonus on the Ordinary Stock held by you on 18th August last.

A receipt is attached, which please sign, and return as early as convenient to the above address.

Yours faithfully,

GLYN, MILLS, CURRIE, &amp; Co.,

Registrars of the Company.

To MRS. MARY J. FARIS.

Account No. 15386.

ARTHUR GUINNESS, SON, &amp; Co.,

Ordinary Stock.

Received certificate for £170, New Ordinary Stock, in payment of the bonus sanctioned at the Extraordinary General Meeting of the Company held on 31st August, 1908.

Dated

1908.

(Signature)



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Evidence was tendered to show that, allowing for the ordinary fluctuations of the market, £2 Ordinary Stock in the Company, after the new allotment, was only of the same monetary value as £1 Ordinary Stock would have been before, and that, therefore, the bonus of additional shares had not the effect of increasing the money value of any stockholder's holding in the Company.

The bequest referred to in question 3 was as follows:—

“I give, devise, and bequeath unto and to my nephews, George Faris, Edward William Faris, Frank Faris, and Andrew Faris, my two mortgages for one thousand pounds and nine hundred pounds, respectively, now affecting the estates of Cecil B. Whyte and Petronella Whyte, situated in the counties of Leitrim and Roscommon, for their own use absolutely, in equal shares, share and share alike. As to the charge affecting the Donard estate, which estate is at present owned by my nephew, James Humphrey Carthrew, of which only £1000 is disposable under the terms of my marriage settlement, I direct that my executor shall hold it in trust as to £500 thereof for my niece, Elinor Graves Goddard, for her own use absolutely. As to £300 thereof for my grandniece, Ethel Goddard, for her own use absolutely. As to one other hundred pounds thereof for my nephew, John M'Mahon, for his own use absolutely; as to one other hundred pounds thereof for my niece, Ella M'Mahon, for her own use absolutely.”

The marriage settlement of the testatrix referred to in said bequest was (so far as material) in the following terms:—

“This indenture made the 18th day of October in the year of our Lord 1854, between John M'Mahon of Gloucester Street, in the City of Dublin, Esq., and Mary Jane M'Mahon, second daughter of said John M'Mahon, of the first part, James Faris of Upper Rutland Street, in the City of Dublin, Esq., of the second part, and Aquila M'Mahon of Gloucester Street aforesaid, and William Faris of Enniskillen, in the county Fermanagh, Esquires, trustees herein named, of the third part. Whereas a marriage is intended to be had and solemnized between the said James Faris and Mary Jane M'Mahon. And whereas it has

been agreed upon the treaty for said intended marriage that the fortune of the said Mary Jane M'Mahon should be £1500, which Harriett M'Mahon, the wife of the said John M'Mahon, hath agreed to give to the said Mary Jane, and that said sum should be secured, disposed of, and settled as hereinafter mentioned, and that the said sum of £1500 should be secured as follows by the bond and warrant of attorney of the said Harriett M'Mahon, the wife of the said John M'Mahon, party hereto, to the said trustees in the penal sum of £3000 conditioned for payment of said sum of £1500, with interest thereon, as hereinafter mentioned, payable in six months after the death of the said Harriett M'Mahon. . . . Now, this Indenture witnesseth that in consideration of said intended marriage, and for the trusts, intents, and purposes hereinafter mentioned in relation to the said sum of £1500, the fortune of the said Mary Jane M'Mahon, it is hereby agreed by and between the parties to these presents, that said bond and warrant, and any judgment to be entered thereon, is hereby vested in the said Aquila M'Mahon and William Faris, their executors, administrators, and assigns, upon the trusts to and for the uses, intents, and purposes hereinafter mentioned, expressed, and declared of and concerning the same, that is to say, upon trust for the said John M'Mahon and Harriett, his wife, until the solemnization of said intended marriage, and after the solemnization thereof, upon trust to pay unto the said Mary Jane M'Mahon, and her assigns, during the term of her natural life, half-yearly, on every 19th day of April and 19th day of October, the interest of said sum of £1500, for her sole and separate use and behoof, and upon her sole and separate receipt and receipts, freed and discharged from the control, debts, and engagements of the said James Faris, or any future husband of the said Mary Jane M'Mahon, and in case the said James Faris shall survive the said Mary Jane M'Mahon, his intended wife, whether there shall be any issue of the said intended marriage or not, then to pay out to the said James Faris and his assigns, during the term of his natural life, until he shall become bankrupt, or seek to be discharged as an insolvent debtor under or by virtue of any of the statutes, now or which shall hereafter be in force for the relief of insolvent debtors in

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*M. R.* any part of the United Kingdom of Great Britain and Ireland  
 1911. the interest of said sum of £1500 so secured as aforesaid, and in  
 GODDARD case of bankruptcy or insolvency of said James Faris as aforesaid,  
 v. and there being issue of said intended marriage then living,  
 OVEREND. then in trust (*for the children as therein declared*), but in case  
 there shall be no issue of the said intended marriage living at  
 the time of the bankruptcy or insolvency of the said James Faris,  
 or there being such issue and that all such issue shall happen to  
 die in the lifetime of the said James Faris, then upon trust to pay  
 such interest to the executors or administrators of said Mary  
 Jane M'Mahon, or such person or persons as shall under the  
 limitations of these presents be entitled to said principal sum.  
 And it is hereby agreed by and between the parties to these  
 presents, in case there shall be living at the death of the survivor  
 of them, the said Mary Jane M'Mahon and James Faris, one or  
 more child or children, the issue of said intended marriage, then  
 (*upon trusts for such children as therein declared*). But in case  
 there shall not be any child or children, the issue of said intended  
 marriage, or that there shall be such issue and that all such  
 children shall happen to die before his or her share or shares shall  
 become vested, then and in such case the said trustees shall stand  
 seized and possessed of said trust funds, in trust as to the  
 principal sum of £1000, part of said sum of £1500 and the  
 interest thereon after the death, bankruptcy, or insolvency of  
 said James Faris, for the said Mary Jane M'Mahon, her executors,  
 administrators, and assigns, for her and their own sole use and  
 benefit, and as to\* the principal sum of £500, the residue of said  
 sum of £1500, and the interest thereon, in trust for the said  
 Harriett M'Mahon, her executors and administrators, absolutely."

At the time of her death, the testatrix was entitled to two  
 mortgages for £1000 and £900 respectively, and to a charge,  
 to which she was entitled in virtue of the said settlement, on  
 the Donard estate; and there was due to her, as and in respect of  
 arrears of interest on the mortgages and charge, the following  
 sums:—

In respect of the £1000 mortgage, £125 11s. 1d.

In respect of the £900 mortgage, £114 2s. 7d.

In respect of the charge on the Donard estate, £262 12s. 9d.

*S. L. Brown, K.C.*, and *Phelps*, for the plaintiff, the executor.

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*Garrett W. Walker, K.C.*, for the defendants John Overend and Mary Overend :—

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The point raised by each question is distinct. As to question 2, instead of paying the reserve fund to shareholders, the Company capitalized it, and distributed 100 per cent. of shares. The shares were doubled in nominal amount.

The shareholders were always the owners of the fund. The same principles apply here as in a case of ademption. The question is, whether the testatrix had at the time of her death substantially the same thing existing: *Oakes v. Oakes* (1); *The Carron Company v. Hunter* (2); *Russell v. Chell* (3). A change in the accidents will not operate as an ademption, if the essence be the same: *Longfield v. Bantry* (4).

*Serjeant O'Brien, K.C.*, and *Treacy*, for the defendant, Ella M'Mahon :—

As to question 3, it is not the simple case of a person lending £1000 on mortgage. The testatrix refers to it as something under the settlement. The arrears of interest go with the debt: *Harcourt v. Morgan* (5). *Roberts v. Kuffin* (6) cannot be reconciled with Lord Langdale's decision in *Harcourt v. Morgan* (5).

*Littledale, K.C.*, for George Faris, the residuary legatee :—

The principal sums carry no interest: Roper on Legacies, vol. i. p. 228.

The bequest of a debt or sum of money due upon a particular security will only pass the capital and not arrears of interest. The £170 stock bequeathed by the testatrix remained in existence at the date of her death, and alone passed under the will to the legatees. Any dividend or bonus on shares declared in her lifetime is capital of the estate. There was no surrender of the old shares.

(1) 9 Hare, 666.

(2) L. R. 1 H. L. Sc. 362.

(3) 19 Ch. D. 432.

(4) 15 L. R. I. 101.

(5) 2 Keen, 274.

(6) 2 Atk. 112.



*M. R.*            *Denning*, for the defendant, Edward W. Faris :—

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The bequest of the two mortgages includes everything. The interest passes with the principal.

*Jonathan Pim, K.C.*, for the defendant, Ralph Hope.

Jan. 20.

THE MASTER OF THE ROLLS :—

I agree that the will refers back to the settlement, and that, in order to construe the will, the Court must read the settlement. Accepting and adopting that view, I find that £1500 was the fortune of Miss M'Mahon, that it was secured by bond and warrant of attorney, that the aforesaid sum of £1500 was put in settlement, and that Mrs. Faris became entitled in the events which happened to a sum of £1000, portion of the settled sum of £1500. The settlement provides that if "there shall not be any child, or children, the issue of the said intended marriage, or that there shall be such issue, and that all such children shall happen to die before his or her share or shares shall become vested, then and in such case the said trustees shall stand seized and possessed of said trust funds, in trust, as to the principal sum of £1000, part of the sum of £1500, and the interest thereon, after the death, bankruptcy, or insolvency of the said James Faris, for the said Mary Jane M'Mahon, her executors, administrators, and assigns, for her and their own sole use and benefit, and as to the principal sum of £500, the residue of said sum of £1500, and the interest thereon, "in trust for the said Harriett M'Mahon, her executors and administrators, absolutely."

I now take the will and read it into the settlement. Is it not absolutely clear that the testatrix in her will was dealing with the same "principal sum of £1000, part of the said sum of £1500," and nothing else? She says, "as to the charge affecting the Donard estate . . . of which only £1000 is disposable of by me, by the terms of my marriage settlement, I direct that my executors shall hold it in trust," as to £500, £300, £100, and £100, as in the will mentioned. In other words, she allots particular parts of a definite principal sum. The word "it" cannot be overlooked. So much for the argument on behalf of

Mr. Serjeant O'Brien's clients. Now as regards Mr. Denning's clients. I apprehend that the distinction between the two cases is clear and plain on the authorities; because the gift on which Mr. Denning relies is not a specific gift of a defined principal sum. The testatrix has given "the mortgages for £1000 and £900" respectively, and it is the "mortgages" that are given, not the defined principal sums. On the authorities I am of opinion that the interest due to the testatrix at her death under the two mortgages passes with principal to the legatees.

The decision of the point involved in the question relating to the Guinness shares may possibly be of importance. The facts, however, are very simple. At the date when Mrs. Faris made her will, she had a sum of £170, ordinary stock of Guinness & Co., registered in her name, and of which she was the beneficial owner. I have myself been puzzled, as Mr. Littledale says he has been puzzled, by the different way in which the ordinary stock of Messrs. Guinness & Co. is dealt with in England and Ireland on the Stock Exchange. But for present purposes there is no need to discriminate. The testatrix dealt with her interest in Guinness's in a perfectly clear way. [His Lordship read the bequest.] Her will was executed on the 24th of January, 1903, and Mr. Littledale is correct in saying that the same sum of £170 stock, referred to in her will, was in existence at the date of her death, and had not been dealt with or transferred in whole or in part by the testatrix during her lifetime. On behalf of the residuary legatee he raises no question of ademption. He says the £170 stock (or shares), specifically bequeathed by the will of the testatrix, remained in existence at the date of her death, and passed under her will to the legatees, and he asserts that nothing else passed. Prior to the death of the testatrix, however, the shareholders in Messrs. Guinness & Co., by virtue of the powers vested in them, passed a special resolution to which reference has been made; and I have before me the exhibit referred to in the affidavit of Mr. Norris Goddard, which shows exactly what the shareholders themselves did in regard to the reserve fund which had accumulated from time to time, and which was in existence in September, 1908. [His Lordship read the circular and resolution.]

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In point of fact the result of the splitting of the shares of the company was merely to substitute two shares for one; or, to reduce the matter to the language of "the man in the street," to exchange a sovereign for two half-sovereigns, and I entertain no doubt that the £340 stock held by Mrs. Faris at the date of her death (under and by virtue of the resolution to which she must be held to have been a party) was merely the equivalent of the £170 stock in Guinness & Co. which she held at the date of her will. This was a business transaction in the interest of the shareholders. The resolution was passed by the shareholders. But the new holding—the two shares for one—really represented the original holding in the company, nothing more and nothing less. The shareholder was in the same position as before, except that he had to sell two shares instead of one, if he wanted to realize his money.

It seems to me to be manifest on the facts of the case that I would be depriving the legatees of the benefit the testatrix intended to confer on them if I did not hold that the sum of £340 Guinness & Co. Ordinary Stock to which the testatrix was entitled at the time of her death, passed under the bequest in her will. I shall answer the question affirmatively, and I shall declare that the £340 passed under the bequest of £170.

A great number of authorities have been cited, and the matter has been very fully and ably argued. But when all is said and done, I agree with Mr. Walker that this is a case in which the principles regulating the familiar doctrine of ademption should be applied, and, if necessary, extended. In the case of *Slater v. Slater* (1) the present Master of the Rolls cites, with approval, the principles laid down by Turner, V.-C. in *Oakes v. Oakes* (2). [His Lordship read the passage.]

Could anyone doubt, on the evidence in this case, that the £170 Guinness Ordinary Stock has been changed in name and form only, and is substantially the same thing as the £340 stock which this lady held at her death. If the resolution relied on by

(1) [1907] 1 Ch. 665, at p. 672.

(2) 9 Hare, 666.

Mr. Littledale had never been passed, I have no doubt that the shares would have been worth what the £340 stock is now worth.

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I think the decisions in *Oakes v. Oakes* (1) and *Slater v. Slater* (2), and the decision in *The Carron Company v. Hunter* (3), all confirm the view that when a testatrix gives shares, she gives all the “accidents” and “incidents,” all the rights arising out of the possession and ownership of her shares. This lady, in common with the other shareholders, was entitled to all the benefits of the reserve fund. It was for the shareholders themselves to settle the method in which their rights in regard to the reserve fund should be dealt with; and, in my judgment, it was not intended that, in acceding to the resolution, they should change the nature of their property, but only that they should alter the accidents or incidents of their holding in the company. I cannot conclude my judgment on this point without referring to the decision of the Vice-Chancellor of Ireland in *Longfield v. Bantry* (4).

The Vice-Chancellor says:—“The principle of law to be deduced from the many authorities on this subject may be shortly stated to be that a specific legacy will be adeemed if the subject of the bequest be not in existence as the same specific thing at the testator’s death. The intention of the testator in his dealing with the subject of the gift, after the making of the bequest, cannot be taken into consideration. A change in the accidents, however, will not operate as an ademption if the substance and essence of the subject remain the same.”

I cannot find any case identical with the present case, in which there has been in name and form an accretion to the original gift while the original gift remains in substance and essence substantially the same, though its accidents have been changed. Nevertheless, my view of the law is, that this £340 represents the £170 bequeathed by the will. The gift fails as to one-third owing to the death of one of the legatees.

(1) 9 Hare, 666.

(2) [1907] 1 Ch. 665, at p. 672.

(3) L. R. 1 H. L. Sc. 362.

(4) 15 L. R. 1. 101, at p. 128.



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Solicitor for the executor: *Norris Goddard.*

Solicitor for the defendants John Overend and Mary Overend:

*T. T. L. Overend.*

Solicitor for the defendant Ella M'Mahon: *J. Perry.*

Solicitors for George Faris and Edward W. Faris: *Hoey & Denning.*

Solicitor for the defendant Ralph Hope: *T. T. L. Overend.*

A. R. C.

## WELDON v. WELDON.

Ross, J.  
1909.

*Will—Construction—Devise in tail—Wills Act (7 Wm. 4, and 1 Vict. c. 26),  
sect. 29—Failure of issue—Contrary intention—Absolute interest in  
chattels real.*

July 1.  
Nov. 8, 17.

Appeal.  
1910.

Dec. 5, 6, 16.

A testator, after the Wills Act, and describing each gift as of “all my right, title, and interest” therein, devised and bequeathed real estate to his eldest son J., and to his heirs lawfully begotten. He also bequeathed to J. chattels real; and declared that, in case J. should die without issue lawfully begotten, the lands devised and bequeathed to him should revert to testator’s second son T., and his heirs lawfully begotten. The testator bequeathed to T. chattels real, and declared that, in case T. should die without issue lawfully begotten, the lands bequeathed to him were to revert to J. Testator further declared that in case J. or T. should die without issue lawfully begotten, the entire of the said lands should be the property of the survivor or longest liver of them, and that in case both should die without issue, the said lands should revert to the testator’s daughter R., and her heirs lawfully begotten, and that in case J., T., and R. should all die without lawful issue, the lands devised and bequeathed to J. should revert to the second son of testator’s brother A. and to his lawful heirs, but in failure of such issue, then to the next son in priority of age, and so on successively in remainder, and the lands bequeathed to T. should revert to testator’s brother B.’s eldest son and his heirs lawfully begotten, but in failure of such to his second or third son by priority of ages, and so on successively in remainder. And the testator declared it to be his will that neither J. nor T. should sell or dispose of any part of the said lands, but that same should remain the *bona fide* properties of them and their heirs for ever.

*Held*, by Ross, J., and by the Lord Chancellor, and Cherry, L.J., affirming his decision, that on the true construction of the will, the operation of sect. 29 of the Wills Act was excluded; that the words “die without issue lawfully begotten” meant indefinite failure of issue; and that consequently under the terms of the bequests of the chattels real, which would have conferred estates tail in real estate, J. and T. took absolute interests in the chattels real respectively bequeathed to them.

*Held*, by Holmes, L.J., that the 29th section of the Wills Act applied to the bequests of the chattels real, and that J. and T. each took an absolute estate in the chattels real bequeathed to them, with an executory bequest to his brother in the event of failure of issue at the time of his death, and with

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a further executory bequest of all the chattels real to R. in the event of failure of issue of both J. and T. at the times of their respective deaths, with a final executory bequest to the testator's nephews in the event of failure of issue of R. at the time of her death.

ACTION by the plaintiff, Catherine Spaight Weldon, widow and universal devisee under the will of John Henry Weldon, deceased, to have the trusts of the will of his father, Thomas Weldon, declared and carried into execution.

The said Thomas Weldon made his will, dated 22nd December, 1848, the material parts of which as relating to the questions arising in the action were set out verbatim in the statement of claim and were as follows: "I leave and bequeath to my eldest son, John Henry Weldon, my right, title, and interest in part of the lands of Ballyellis, as held by the Earl of Listowel, and to his heirs lawfully begotten after the death of his mother; I likewise leave and bequeath unto my said son, John Henry Weldon, my right, title, and interest in the lands of Ahavrin in the county of Cork, Barony of Earl Muskerry, or the issues and profits arising therefrom, after paying his mother her claims thereon during her natural life, with liberty to settle a jointure on his wife at the rate of 10 per cent. he may receive in marriage portion; I further leave and bequeath unto my said son, John Henry Weldon, my right, title, and interest in the house and demesne of Riversfield, with all timber heretofore planted and copped up by me and registered; I also leave and bequeath unto my said son, John Henry Weldon, my right, title, and interest in the small glebe farm of Ballingaddy, called Ballingaddy East Glebe; but in case he, the said John Henry Weldon, should die without issue lawfully begotten, then, and in such case, the said several lands and premises, as above-mentioned and described, are to revert to his brother, Thomas Pyne Weldon, and his heirs lawfully begotten. I leave and bequeath to my son Thomas Pyne Weldon, the mills of Kilmallock, with the lands adjoining, together with the mill fields and Crotta as described in lots 18, 21, and 22 in particulars of sale, and purchased by me for £1950 from the trustees of the late Sir Leonard Worsley Holmes; I likewise leave and bequeath to my son, Thomas Pyne Weldon, my right, title, and interest

in the house and demesne lands of Greenfort, and other lands thereunto annexed in the county of Cork, with liberty to settle a jointure on his wife out of said places at the rate of 10 per cent. of every £100 he may receive as a marriage portion; I further leave and bequeath to my said son, Thomas Pyne Weldon, my right, title, and interest in the lands of Cooline in the county of Cork; and I also further leave to my said son, Thomas Pyne Weldon, my right, title, and interest in the two farms I hold near Kilmallock, called Deebert and Priant, in the liberties of said town; but in case he, the said Thomas Pyne Weldon, should die without issue lawfully begotten, then, and in such case, the said several lands and premises, as above-mentioned and described, are to revert to his brother, John Henry Weldon.”

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After giving pecuniary legacies to testator's daughter, Rebecca Frances Weldon, the will continued, “but in case either of my said sons should depart this life without issue lawfully begotten, then and in such case the entire of my said lands and premises is to be the property of the survivor or longest liver of them; but in case both of them should depart life without lawful issue, then and in such case the whole of the said lands and premises already mentioned and described are to revert to their sister, Rebecca Frances Weldon, and her heirs lawfully begotten; but in case all of my children should depart life without issue, then and in such case those several portions or denominations bequeathed to my son, John Henry Weldon, are to revert to Robert Weldon, second son of my eldest brother Robert Weldon, and to his lawful heirs; but in failure of such issue then to the next son in priority of age, and so on successively in remainder; and those portions or denominations bequeathed to my son Thomas Pyne Weldon are to revert to my brother John Weldon's eldest son and his heirs lawfully begotten; but in failure of such to his second or third son by priority of age, and so on successively in remainder. And my further desire and will is that neither of my said sons, John Henry Weldon, and Thomas Pyne Weldon, or their heirs shall sell or dispose of any part of said bequeathed properties or estates, but to remain the *bona fide* property of them and their heirs for ever.”



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The testator died on the 9th May, 1863, and letters of administration with the will annexed of his personal estate were granted to his two sons, John Henry Weldon and the Rev. Thomas Pyne Weldon.

The testator at the time of his death held Ballyellis in fee-farm, and the other denominations of land mentioned in the will for various chattel interests; and, except Greenfort, Deebert, and Priant, which had been surrendered, and Ballingaddy, of which the fee was acquired, they continued to be so held by John Henry Pyne and Rev. Thomas Weldon Pyne up to the time of their respective deaths, and afterwards, except the lands of Cooline, by the plaintiff up to the time of action brought; Cooline being in the possession of the defendant Francis C. Weldon.

John Henry Weldon intermarried with the plaintiff on 1st November, 1864. By settlement executed on the occasion of the marriage (but not enrolled), dated 31st October, 1864, he granted all the lands left to him by his father's will to trustees and their heirs in trust for himself for life, and after his death, subject to an annuity to the plaintiff, and in default of issue of the marriage (which event happened), in trust for himself, his executors, administrators, and assigns.

By deed poll dated 2nd August, 1876, the Commissioners of Church Temporalities in Ireland, in consideration of £850, granted to John Henry Weldon, his heirs and assigns, the fee-simple of Ballingaddy.

By disentailing deed, dated 29th March, 1890, and duly enrolled, John Henry Weldon barred the entail in Ballyellis, and in all other lands of which he was seised as tenant in tail under the testator's will.

Rev. Thomas Pyne Weldon made his will, dated 2nd June, 1893, and thereby gave and bequeathed his interest in the lands of Cooline to his cousin Francis Cornwall Weldon, and gave and bequeathed the rest of his property to John Henry Weldon. He died unmarried on 24th January, 1894, and probate of his will was granted to John Henry Weldon, one of the executors therein-named. By disentailing deed, duly enrolled and dated 3rd October, 1905, John Henry Weldon

barred any estate tail in the lands derived by him under the will of the said Thomas Pyne Weldon.

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John Henry Weldon made his will, dated 26th November, 1895, and thereby left and bequeathed all his property to the plaintiff. He died on 23rd November, 1907, without issue, and on the 3rd February, 1908, letters of administration of his personal estate with the will annexed were granted to the plaintiff.

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Rebecca Frances Weldon married John Samuel Levis, M.D., and died on 16th September, 1888, without issue. John Samuel Levis obtained letters of administration of her personal estate, and made a will and codicil, leaving all his property to his nephew Bruce Levis, whom he appointed executor, and to whom probate was granted. Bruce Levis was added as a co-defendant during the arguments, but his counsel did not claim any part of the property.

The other defendants in the action were Lizzie Weldon and Hannah Sophia Josephine Dupré, daughters, next-of-kin and co-heiresses of John Weldon, the eldest son of John Weldon, brother of the testator, who claimed the lands bequeathed to Thomas Pyne Weldon; Francis Cornwall Weldon, who claimed the lands of Cooline, under the will of Thomas Pyne Weldon, and having been in possession thereof since the death of the latter, relied in the alternative on the Statute of Limitations; and Robert Weldon, the second son of Robert Weldon, eldest brother of the testator. The defendant Robert Weldon, died after the commencement of the action, which was continued against his executor, Robert MacIntosh Weldon; and his eldest son and heir-at-law, Henry Bankes Weldon, was subsequently added as a defendant by amendment, and claimed to be entitled to the lands of inheritance devised to John Henry Weldon.

*Serjeant O'Brien, K.C., A. M. Sullivan, K.C., and E. V. Longworth,* for the plaintiff.

*Matheson, K.C., and Redmond F. Carroll,* for the defendants Lizzie Weldon and Hannah Sophia Josephine Dupré.

*H. Wilson, K.C., and E. S. Murphy,* for the defendant Francis Cornwall Weldon.

*Ross, J.*                 *Serjeant O'Connor, K.C., and John Donaldson, for the defendants*  
 1909.                 Robert Mac Intosh Weldon and Henry Bankes Weldon.

*WELDON*                 *H. D. Conner, K.C., and Norwood, for the defendant Bruce*  
*v.*                         Levis, said their client did not claim any of the property.  
*WELDON.*

Nov. 17.             Ross, J. :—

The will of Thomas Weldon is sufficiently set out in the statement of claim.

He had two sons, John Henry Weldon and Thomas Pyne Weldon. To John Henry Weldon, and his heirs lawfully begotten, he leaves and bequeaths Ballyellis, which is fee-simple property, also three other estates held for chattel interests, using no words of limitation. He gives John Henry Weldon a power of jointure on one of the latter estates. He goes on to say that, in case John Henry Weldon should die without issue lawfully begotten, then and in such case the premises are to *revert* to Thomas Pyne Weldon and his heirs lawfully begotten. He then leaves to Thomas Pyne Weldon certain lands held for chattel interests with a power of jointure. Then he adds that in case Thomas Pyne Weldon should die without issue lawfully begotten then the lands are to *revert* to John Henry Weldon.

He then goes on to say that, in case either of the said sons should depart this life without issue lawfully begotten, then the entire of the said lands should be the property of the survivors, and in case both should depart this life without lawful issue, then the whole of the said lands should revert to their sister, Rebecca, and her heirs lawfully begotten.

He makes further gifts over in case all his said children should die without lawful issue. He concludes by declaring that it is his further desire and will that neither of his said sons, John Henry Weldon and Thomas Pyne Weldon, or their heirs, should sell or dispose of any part of the said bequeathed properties or estates, but to remain the *bonâ fide* property of them and their heirs for ever.

The question in the case is, what estate did the will confer on the two sons? The last clause in the will, although it is quite inoperative, very clearly shows what he means. He desires that the estates conferred on each of his sons should descend to

the respective heirs of the sons. That means an estate tail continuing to the end of time, provided his sons have heirs. In the interpretation of wills it is not legitimate to contemplate the possibility of an estate tail being barred.

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It is plain that he believes he can limit estates in tail in the chattel interests as well as in the estates in fee. He speaks of the "entire" of the lands and the "whole" of the lands, evidently intending that lands of both tenures should go together.

The will begins with an undisputed estate tail in Ballyellis, and there is an estate tail given to Thomas Pyne Weldon if John Henry Weldon should die without issue lawfully begotten.

It has been contended, as the words "die without issue" must by section 29 of the Wills Act be construed to mean a failure of issue at his death, and not an indefinite failure of issue, that, therefore, there is an executory devise over. But, I think, in this case there is a contrary intention apparent by reason of the prior estate tail.

The will taken as a whole shows that the estates devised to Thomas Pyne Weldon are to devolve in the same way as those devised to John Henry Weldon. I do not mean by this decision to lay down that the fact that the realty and personalty are dealt with by the same words necessitates the conclusion that the personalty is intended to go with the realty. But the way in which the realty and personalty are jointly dealt with throughout this will convinces me that the testator intended to create an estate tail in all the property devised to his sons.

In Ballyellis alone he has succeeded in creating an estate tail.

In all the other cases, where the lands are held for chattel interests, the attempt of the testator to create an estate tail has had the effect of conferring an absolute interest on each of his sons. In the events that have happened the plaintiff must be declared entitled as universal devisee and legatee under the will of John Henry Weldon to all the lands except Cooline, which passed under the will of Thomas Pyne Weldon to the defendant Francis Cornwall Weldon.



*Appeal.*  
1910.

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Dec. 5, 6.

Lizzie Weldon and Hannah Sophia Josephine Dupré  
appealed (1):—

*Ronan, K.C.*, and *Redmond Carroll*, for the appellants:—

This is the case of a will to which the Wills Act, section 29, *prima facie* applies. That section was passed for the purpose of preventing the intention of testators from being defeated. Even before the Act the presumption was held in many cases to exist, that a gift of chattel property, with a gift over on the death of the legatee without issue, *prima facie* meant failure of issue at his death. Thus in *Ranelagh v. Ranelagh* (2), where the gift was to five persons, with a gift over to the survivors in case of the death of any of such persons, it was held to be a gift over on failure of issue at the time of death. Sir John Leach, M.R., says at p. 443, "I adopt the language of Sir W. Grant, in *Massey v. Hudson* (3), and take the rule to be that, *prima facie*, a bequest over to the survivor or survivors of two or more persons, after the death of one without issue, affords the presumption that an indefinite failure of issue could not be in the testator's contemplation." His decision was affirmed by Lord Brougham, L.C., on appeal. In *Forth v. Chapman* (4) (decided in 1720), it was held that the words "die without leaving issue" import, in a gift of chattels real, failure of issue at the death of the person spoken of, and not an indefinite failure of issue, and that it made no difference that the gift included freeholds. See Hawkins on Wills, p. 213. That case, which may be treated as a leading authority, was referred to in the recent case of *Studd v. Cook* (5), where Lord Selborne says, p. 592: "By English law, real property can be entailed so that (unless and until the entail is barred) it may be transmitted through the whole intended course of succession, but personal property cannot be. The disposition, however, of the personal property would not therefore fail; it would receive as much effect as the law applicable to personal property could give it, which would vest that property absolutely in the first

(1) In the Court of Appeal, before THE LORD CHANCELLOR, and LORDS JUSTICES HOLMES and CHERRY.

(2) 2 Myl. & K. 441.

(3) 2 Mer. 130.

(4) 1 P. Wms. 663.

(5) 8 App. Cas. 577.

taker of the lands. The case of *Forth v. Chapman* (1) is a well-known and oft-quoted example of the flexibility in English law, with respect to different kinds of property governed by different rules, and having different incidents, of the same words occurring in a single clause of disposition."

*Bamford v. Chadwick* (2) was a Common Law case presenting an extraordinary resemblance to the present. The will to be construed was before the Wills Act. Maule, J., says, "By the rules of construction you are to give the same words a different construction when applied to real and personal property." And Jervis, C.J., says, "It is settled that the words 'dying without leaving issue' mean an indefinite failure of issue as to real property, and 'a failure of issue at the time of the death' as to the personal property."

In *Atkinson v. Hutchinson* (3), the testator devised a term in trust for such children as he should leave at his death, and in case all his children should die without leaving any issue, then to a devisee in remainder; there on the death of the testator's only child, without leaving issue at her death, the devise over was held good. The principle of these cases was recently recognized in *Sheridan v. O'Reilly* (4). Again, in *Greenway v. Greenway* (5) a gift of realty and personalty to a man and the heirs of his body, with a gift over if he should die without issue, was construed differently as regards the two kinds of property. The two cases last quoted were on wills executed since the Wills Act.

The 29th section of the statute precludes all possible contention as to the chattels real in this case; *Dodds v. Dodds* (6). The general rule that "die without issue" means failure of issue at the death of the first taker must apply to the chattels real. Though there may have been shown, as regards Ballyellis, a contrary intention from the express estate tail devised to John Henry Weldon, there is nothing of the kind in the gift of the chattels real, which must, therefore, be construed as directed by the section (7).

(1) 1 P. Wms. 663, at p. 667.

(4) [1900] 1 I. R. 386, 396.

(2) 2 W. R. 531.

(5) 4 De G. J. & S. 128.

(3) 3 P. Wms. 258.

(6) 10 Ir. Ch. R. 476.

(7) Counsel for the appellants also based an argument on the fact that counsel for the executor of J. S. Levis, not having made any claim, must be taken to have disclaimed any estate in Rebecca Levis, but it did not become necessary to deal with this argument in any of the judgments.

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By the words "should die without issue lawfully begotten" the testator here means indefinite failure of issue. The will shows an intention contrary to the application of section 29 of the Wills Act, which, therefore, does not affect the present case: *Candy v. Campbell* (1); see *per* Lord Brougham, L.C., p. 427; *Fay v. Fay* (2), a decision of Sir Edward Sullivan, M.R.; *Neville v. Thacker* (3). If you have the words "dying without issue" in one part of a will, clearly meaning indefinite failure of issue, you must give them the same meaning in other places where they occur, though used ambiguously, and the result is that where realty and personalty are given together, the donee takes an estate tail in the real estate, and an absolute interest in the personalty: *Green v. Green* (4). *Greenway v. Greenway* (5) turned on the particular language of the will which the Court had to construe: *Hodgson v. Bussey* (6); *Cullen's Estate* (7); *Pye v. Linwood* (8).

As to words which would give an estate tail in real estate conferring the absolute interest when used in the disposition of personalty, see Mr. Jarman's note: Jarman on Wills, 6th ed., 1859. Here the word "leaving" does not occur. As to the word "survivor," it is merely a repetition of what went before: *Chadock v. Cowley* (9); *Britton v. Twynning* (10); *In re Cleary's Trusts* (11), where the will was executed since the Wills Act; *In re Sallery's Estate* (12). Here there is a contrary intention, which excludes section 29 of the Wills Act: *Green v. Giles* (13).

In *In re Lowman*; *Devenish v. Pester* (14) it was held that, where there were successive limitations in a will of personal estate to several persons conferring thereby absolute interests, the first of those persons who survived the testator would take absolutely,

(1) 2 Cl. & Fin. 421.

(2) 5 L. R. Ir. 274.

(3) 23 L. R. Ir. 344, at p. 355.

(4) 3 De G. & Sm. 480.

(5) 2 De G. F. & J. 128.

(6) 2 Atk. 88.

(7) [1907] 1 I. R. 73.

(8) 6 Jurist, 618.

(9) Cro. Jac. 695.

(10) 3 Mer. 176.

(11) 16 Ir. Ch. R. 438.

(12) 11 Ir. Ch. R. 236.

(13) 5 Ir. Ch. R. 25.

(14) [1895] 2 Ch. 348.

although he would have taken nothing if a legatee previously named in the will had survived; the effect of the death of the prior legatee being to accelerate, not to destroy, the later gift. In that case limitations applicable to real estate were used in the disposition of property which the testator erroneously supposed to be unconverted, but which had been in fact converted into personalty. That was a decision of Lindley, Lopes, and Kay, L.JJ., overruling the judgment of Kekewich, J., and adopting the view taken by James, L.J., in *In re Stringer's Estate*; *Shaw v. Jones* (1).

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The 29th section only deals with ambiguous expressions, such as "die without issue," "die without leaving issue." It does not apply where the words used are in themselves clear, such as "die without heirs male of his body lawfully begotten": *Dawson v. Small* (2), per James, L.J., p. 653; *Harris v. Davis* (3); Jarman on Wills, 6th ed., p. 1962.

THE LORD CHANCELLOR:—

Dec. 16.

This case depends on the true construction of the will of Thomas Weldon.

The testator unfortunately employed as the draftsman a local solicitor who used technical words with a happy indifference or entire ignorance of their legal effect, and it consequently has been left to lawyers of another generation to determine what intention is to be attributed to Thomas Weldon from the use of the words employed.

It is not surprising that different views should be entertained as to the construction of such a document. Lord Justice Cherry and I agree in the result of Mr. Justice Ross's judgment, though in part at all events for different reasons, and Lord Justice Holmes concurs so far as regards the freehold lands of Ballyellis.

Thomas Weldon's will bears date in 1848, after the passing of the Wills Act, and he died in 1863. The case was mainly argued on the application and effect of the 29th section of the

(1) 6 Ch. D. 1, 13.

(2) L. R. 9 Ch. App. 651.

(3) 1 Coll. C. C. 416.



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Wills Act. First, Does the will itself disclose an intention that the special provisions of the section as regards the issue of the first taker shall not apply to this will? Secondly, If it applies at all, how far does it apply to the gift to John Henry Weldon, and Thomas Pyne Weldon, and Rebecca Frances, whether we find the gifts of real and personal estate grouped together or given separately?

Thomas Weldon had three children—John Henry Weldon, his eldest son, Thomas Pyne Weldon, and a daughter, Rebecca Frances Weldon.

His property consisted of one freehold denomination, called Ballyellis, and several chattel real interests, and also some pure personalty. I do not think any help is to be derived from the bequests to his daughter of the £1000 charge or legacy of £500, and I shall not further refer to them. The general scheme of the will is to give one set of lands to the eldest son John Henry and his issue, with a gift over to the second son, Thomas Pyne Weldon, in language which confers an estate tail, and another set of lands to the second son, Thomas Pyne Weldon, and his issue, with a gift over to the eldest son; and a gift over also as regards both sets of lands to the daughter, Rebecca Frances, and her heirs lawfully begotten; with an ultimate gift as regards John Henry's portion to a nephew, Robert, and to his lawful heirs, in language which requires to be fully stated, and an ultimate gift as regards Thomas Pyne's portion to his brother John Weldon's eldest son and his heirs lawfully begotten, in a manner which I shall state hereafter.

As my view is that the applicability of the 29th section is altogether excluded by the exception contained in the section where a contrary intention appears on the will itself, I shall refer first to the section, and then to the language in this will which I think excludes its operation. That section was designed, says Lord St. Leonards, to introduce as a universal rule a rule that the words "dying without issue," &c., shall receive the construction of dying without issue living at the death of the party named, in all cases except those which fall within the limits of the exceptions contained in the section. If the exceptions apply, the old law will remain; and, to use the words of Lord St. Leonards in his

Work on Real Property Statutes, p. 384, "The Act assumes that such an intention will appear, when the person whose issue is to fail has a prior estate tail under, it should seem, some prior instrument, or there shall be in the will a preceding limitation to such person or his issue in tail, but not arising from any implication from the words 'die without issue,' &c.' or otherwise, that is," as he says, "I presume, unless it shall by the will otherwise appear." Lord St. Leonards in the case of *Re O'Beirne* (1) explains the exception arising from the gift of a preceding estate tail. He says:—"If you give an estate to a man in tail, and for want of issue over, then of course the contrary intention does appear. The whole line of issue is provided for; the gift over is to take effect on the same event, and therefore the words must mean an indefinite failure of issue. So, supposing there is a prior estate tail, without an implication arising from such words, we have the same thing." I quite agree that an intention to exclude under the word "otherwise" cannot be collected from the mere use of the words, "dying without issue," &c., which before the statute imported an indefinite failure of issue, and which it was the intention of the Act to control.

In this will, as we often find in similar documents, the key to the general intention appears in the general expressions at its end, after the gift to the two sons and his daughter: "But in case all of my said children should depart life without lawful issue then and in such case those several portions or denominations bequeathed to my son John Henry Weldon are to revert to Robert Weldon, second son of my eldest brother Robert Weldon, and to his lawful heirs; but, in failure of such issue, then to the next son, in priority of age, and so on successively in remainder; and those portions or denominations bequeathed to my son, Thomas Pyne Weldon, are to revert to my brother John Weldon's eldest son, and his heirs lawfully begotten; but, in failure of such, to his second or third son by priority of age, and so on successively in remainder. And my further desire and will is that neither my said sons, John Henry Weldon, and Thomas Pyne Weldon, or their heirs, shall sell or dispose of any part of said bequeathed

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There are indications to the same effect in the particular gifts, which I shall notice later on, that what he meant was an indefinite failure of issue, and the passages I have read seem inconsistent with any other idea.

Before I pass to the particular gifts, I wish in this connexion to refer to the decision of Lord Chancellor Brady in *Green v. Giles* (1).

That case depended upon the nature of the estate which Arthur M'Guire took under the will of his uncle, Thomas M'Guire, dated 11th December, 1845. The will, after bequeathing certain pecuniary and specific legacies, was as follows:—"I leave and bequeath to my nephew, Arthur M'Guire, Esq., son of my brother, William M'Guire, Esq., the house and demesne of Clonea, together with the stock, plate, furniture, &c., in as full and ample a manner as I hold it at present, but subject to the head-rent of £200 per annum, which rent is to be discharged only out of the interest of my patrimony bonds and judgment debts payable to me out of the estate, the interest of which I hereby leave and bequeath him to discharge said rent, and for his future support and maintenance, and he is never to demand the principal so long as the rent and interest is satisfactorily settled; and in case he should die without male issue lawfully begotten, and arriving at the age of twenty-one years, it shall descend to his brother, the Rev. Walter M'Guire, and to his male issue lawfully begotten and arriving at the age of twenty-one years; and in case he should die without male issue lawfully begotten, then it shall descend to his brother, Samuel Edward M'Guire, and to his male issue lawfully begotten and arriving at the age of twenty-one years; and should these die without male issue then I leave and bequeath the above-named house and premises at Clonea, and the bonds before mentioned, to discharge the charge on same, to my nephew the Rev. Walter Giles and his family, on his taking the name of M'Guire, so that the estate may be retained in the family; the plate, linen, furniture, &c., to remain in possession of the person holding Clonea; the

interest of all bonds which remain on the estate to continue to remain on the estate, and to descend from heirs to heirs, as above stated."

The question was, whether Arthur M'Guire took an absolute interest in the property, or only an estate for life, with a devise over; and that, he having died without issue, it went in succession to the persons named in the will.

Lord Chancellor Brady said, at page 33 of the report:—"The question seems to turn almost entirely on the words of the 29th section of the recent Statute of Wills, as the will was made after that Act came into operation; indeed, I may say that the question turns altogether upon that section, for if that Act had never been passed, it is quite clear that the devise over would have been invalid; but as the will is subject to the provisions of the statute, these questions arise—first, whether the terms of the gift bring it within the scope of that clause? and secondly, whether there is to be found in the will such an indication of intention that the property should not go over, save upon an indefinite failure of issue, as to bring it within the saving in that section. The words of the Act are sufficiently plain. It enacts" [and the Lord Chancellor read the section]. "Now here it is plain that there is no prior estate tail given; the preceding gift, if it means anything, gives the absolute estate; there is, therefore, nothing to bring it within the first two clauses of the saving. Then come the words 'or otherwise' in the statute; and it is to be considered whether there is anything to make these words applicable."

There was there a contention, apparently of considerable weight, that the statute did not apply at all, because of the words "male issue lawfully begotten and arriving at the age of twenty-one years," but the Lord Chancellor came to the conclusion that "the qualification of dying under twenty-one years did not prevent their meaning an indefinite failure of issue." He then proceeds, p. 37—"Now, I think it is important here to look at the whole scope of the will; and when I do, it is impossible to avoid seeing that it was the intention of the testator that, so long as there should be issue of any of the previous devisees, the estate should not go over. That is certainly what he meant, and that would be a gift over

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upon an indefinite failure of issue. The only other meaning which could possibly be given to it would have been that the issue should take a fee in the lands of Clonea, and an absolute interest in the personalty. That certainly was not the intention of the testator; his primary intention was, that the property should go to the whole line of issue of each devisee for life, and that is an intention which the law defeats. It certainly is strange, that whenever we arrive at the conclusion that a testator meant his estate to go through a long series of issue, then we at once arrive at a conclusion that a construction must be adopted which will, or may, defeat that intention."

We must, of course, find the contrary intention from the will, excluding the indefinite use of the words "without issue," introducing the gift over, which the Act excludes from consideration. I think the expressions relied on by the Lord Chancellor in *Green v. Giles* (1) are not as strong as those which I have read from the will here. That case is referred to in *Theobald on Wills* as a binding authority.

If I am right in this, there is no occasion to deal with the particular gifts; but those to the eldest son directly cannot, I think, receive any other construction than that which the judgment of Mr. Justice Ross has given to them.

The gift to the eldest son, John Henry Weldon, comprises the freehold land of Ballyellis, and also certain chattel real interests, including the glebe farm, Ballingaddy, of which John Henry Weldon appears to have purchased the fee after the testator's death. The freehold and chattels real are separately given. The language is material. He first says:—"I leave and bequeath to my eldest son, John Henry Weldon, my right, title, and interest, in the lands of Ballyellis, as held by the Earl of Listowel, and to his heirs lawfully begotten, after the death of his mother."

This is an express estate in tail in Ballyellis given to John Henry. He then bequeaths chattel real interests in words which would give all his estate, and concludes with the gift of Ballingaddy farm as follows:—"I also leave and bequeath unto my said son, John Henry Weldon, my right, title, and interest in the

(1) 5 Ir. Ch. Rep. 25.

small glebe farm of Ballingaddy, called Ballingaddy East Glebe, but in case he, the said John Henry Weldon, should die without issue lawfully begotten, then, and in such case, the said several lands, and premises, as above-mentioned and described, are to revert to his brother, Thomas Pyne Weldon, and his heirs lawfully begotten."

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The gift over is thus to take effect if John dies without issue lawfully begotten, and it applies both to Ballyellis and all the chattel real interests, and is an express estate tail given in terms to Thomas Pyne Weldon.

So far as regards Ballyellis, there is a preceding gift in tail, arising not from implication, but from express words, and that entail was barred, and the plaintiff takes Ballyellis under John Henry Weldon's will; and the appeal must therefore fail as to Ballyellis, the 29th section being excluded by the prior estate tail. This is, of course, irrespective of the other question arising on the will with which I have first dealt. But, as regards the gift of the chattel real interests, also directly to John Weldon, with the gift over, in case he should die without issue lawfully begotten, to Thomas Pyne Weldon and his heirs lawfully begotten, two observations arise on this; (1) that the freehold and chattels real are given over together; and (2) that the gift of the chattel interest is given in terms which in reality create an estate tail.

*Green v. Green* (1) is an express authority in point. That was a gift to trustees of residuary realty and personalty "in trust for all and every my child and children in equal shares and proportions, and the several heirs of their respective bodies; and, in case there shall be a failure of issue of any of said children, then as to the share or shares of him, her, or them, whose issue shall so fail to the use of the others or other of them as tenants in common, and the several heirs of their respective bodies, and in case there shall be a failure of issue of all such children, then to the use of such one child and the heirs of his or her body. Vice-Chancellor Knight Bruce, says:—"I agree that, speaking with strict accuracy, there cannot be a bequest of personalty to a person in tail; but looking at the words of the 29th section of the Wills

(1) 3 De G. & Sm. 480.

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Act, I must decide in accordance with the prayer of the bill that the plaintiff, John Fowler Green, is entitled in fee to half of the freeholds, and that he is entitled absolutely to half of the leaseholds." *Dawson v. Small* (1) may also be referred to.

The text writers all take the same view: Theobald, p. 709; and, in the last edition of Williams on Executors, p. 866, the editor writes:—"It is an established rule of construction with regard to wills of personal estate, that where personal estate is given in terms which, if applied to real estate, would create an estate tail, the property vests absolutely in the first taker, and consequently devolves at his death on his executors and administrators, whether he has issue or not. Hence, generally speaking, when realty and personalty are included in one gift, if the legatee takes an estate tail in the former, he takes the latter absolutely."

I think the result is clear as regards all that John Henry Weldon directly took in both Ballyellis and the chattel real interests, on both the grounds I have stated.

The chattel interests given directly to Thomas Pyne Weldon stand on a different footing. I have already expressed my opinion that a contrary intention is shown on the whole will sufficient to exclude the 29th section; but if this were not so, I think the interests given to Thomas Pyne Weldon directly would devolve on Rebecca in tail, *i.e.*, in result absolutely, for the same reasons as I have already stated.

In my opinion, however, the contrary intention appears in this will, and both John Henry and Thomas Pyne take absolutely. As whatever Thomas took absolutely devolved on John Henry under Thomas's will, except Cooline, and as whatever John Henry took absolutely devolved under his will on the plaintiff, I think the plaintiff must succeed as to all the lands except Cooline.

I should have mentioned that I think the gift, as between the sons, to the "survivor or longest liver of them," is merely intended as a summary of what the testator had already previously expressed.

I think the appeal must be dismissed.

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HOLMES, L.J. :—

This action has been brought to have the trusts of the will of Thomas Weldon, who died in the year 1863, carried into execution, and as a preliminary thereto, to have the will construed so as to declare who are now entitled to the lands therein mentioned. It will, I think, be more convenient, before referring to the parties to the action and to the interest in the testator's estate claimed by them, to apply myself to the construction of the will just as if I had been called on to do so immediately after the testator's death. It is not an instrument which enables me to ascertain, or even guess, what were the particular intentions of Mr. Weldon when he executed it in 1848. If he could have foreseen the events that have since happened, I doubt not that he would have desired that one portion of his lands should now be vested in the defendant, Robert Weldon, and the rest of them in the defendants Lizzie and Sophie Josephine Weldon. But he had no knowledge or even reasonable anticipation of the history of his family during the sixty years that have followed the execution of his will; and even if his intentions could affect its construction, there exists no clue to them. This is one of the cases which must be decided by giving words and phrases, often found in testamentary documents, their legal meaning and effect; and although it may seem presumptuous for me to say so, I have had little difficulty in construing most of the disposition of the testator's property. We have been told that the will was prepared by a gentleman of the legal profession; and although he was not a skilful draftsman, there is clear indication of his being aware that an estate tail could only be created in real estate, and that the words giving such an estate in freehold property would confer an absolute interest in chattels real.

I come now to the will. The testator had two sons, John and Thomas, and one daughter, Rebecca. He held at the date of his will the lands of Ballyellis under a lease for lives renewable for ever which, either before or after his death, was converted into a fee-farm grant. All the rest of his lands, of which there were



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six or seven denominations, were held under leases for terms of years. His will begins by devising Ballyellis to his eldest son John, and his heirs lawfully begotten—appropriate words for conferring an estate in tail or *quasi*-tail. He then gives to John three of the chattels real. These gifts are followed by no words of limitation. On the contrary, he bequeaths “all his right, title, and interest” therein—a usual mode of describing an absolute bequest. So far there is no ambiguity. Then follow the words, “but in case he, the said John, should die without issue lawfully begotten, then and in such case the said several lands and premises are to revert to his brother Thomas Pyne Weldon and his heirs lawfully begotten.”

What is the meaning in this sentence of the words “die without issue lawfully begotten”? Section 29 of the Statute of Wills gives the answer by providing that in any devise or bequest of real or personal estate the words “die without issue,” or “die without leaving issue,” or “have no issue,” or any other words which may import either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime, or at the time of the death, of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will, by reason of such person having a prior estate tail, or of a preceding gift being, without any implication arising from such words, a limitation of an estate tail to such person or issue or otherwise. Then follows a proviso which I need not read, as it has not been referred to by either side, and has no bearing on the matters now in controversy. I apply this section to the gifts to the eldest son John. Mr. Sullivan seems to think that the addition to the words “die without issue,” of the words “lawfully begotten,” makes a difference. There is no authority for this, and I am of opinion that so to hold would be inconsistent with the section, inasmuch as they import either a failure of issue at the person’s death or an indefinite failure of issue. Is there, then, a contrary intention apparent by reason of such person having a preceding gift in tail? Certainly there is as to Ballyellis, for John is made tenant in tail thereof in

appropriate language; but it is equally certain that there is none regarding the chattels real, the entire interest in which is given to John without any words of limitation. It seems to have been assumed by counsel for the plaintiff that if the words import an indefinite failure of issue in the one case, a similar construction must be given them in the other. I have always understood the contrary to be the law. There is, in express terms, a gift of Ballyellis in tail, and there are absolute gifts, equally express, of the lands held for terms of years. The former comes within the exception in section 29, the latter do not; and I cannot in defiance of its language hold that in the case of the latter the words "die without issue" mean an indefinite failure of issue. Accordingly, I am satisfied that while John was given an estate tail or *quasi*-tail in Ballyellis, with a remainder to Thomas, he took an absolute estate in the chattels real, subject to an executory bequest to his brother in the event of failure of issue at the time of his death. This disposes of Ballyellis, inasmuch as John, having made himself absolute owner by barring the entail, devised it to the plaintiff. A question, however, arises regarding the interest taken by Thomas in the chattels real given in the first instance to John. These lands as well as Ballyellis are, on failure of John's issue, given to Thomas and *his heirs lawfully begotten*. The effect of this would have been before the Statute of Wills, and is still, to give the entire interest to Thomas. Is this within the exception, contained in the 29th section, of a contrary intention appearing by reason of a preceding gift of an estate tail to Thomas. In the absence of authority, I would answer without hesitation in the negative, for the simple reason that they do not give him such an estate in the chattels real. To hold otherwise would imply that a testator can bequeath an estate tail in lands held for a term of years. The difficulty I have on this point arises from the circumstance that it is treated in the text-books as a doubtful matter; and *Green v. Green* (1) appears to be inconsistent with the view I have expressed. I must, however, form my own opinion; and I accordingly hold that these words

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(1) 3 De G. & Sm. 480.

*K. B. Div.* have no other effect than if the testator had given to Thomas, on  
 1910.  
*WELDON* failure of his brother's issue, the entire interest in the chattels  
*WELDON* real. How this bequest is affected by subsequent directions in  
*WELDON* the will remains to be discussed; but, before considering them, I  
*Holmes, L.J.* must refer to the immediate bequests to Thomas. These consist  
 of lands held for terms of years, and the entire interest therein is  
 bequeathed to Thomas; but, in case he should die without issue  
 lawfully begotten, then the several lands and premises are to  
 revert to his brother John. The language of these gifts differs  
 from that of the gifts to John in that "heirs lawfully begotten"  
 or equivalent words do not occur at all. I presume that the  
 draftsman, having inserted them in the previous dispositions on  
 account of Ballyellis, considered that they ought not to be intro-  
 duced where all the lands were chattels real.

Up to this point we have certain lands held for terms of years  
 given to John, with an executory bequest in case of his death  
 without issue to Thomas; and other lands of the same tenure  
 given to Thomas, with a like executory bequest to John. I  
 now come to what follows. After bequests of pecuniary legacies  
 to his daughter, Rebecca, the testator goes on to say—"In case  
 either of my said sons should depart this life without issue law-  
 fully begotten, then and in such case the entire of my said lands  
 and premises is to be the property of the survivor or longest liver  
 of them; but, in case both of them should depart this life without  
 lawful issue, then, and in such case, the whole of the said lands  
 and premises are to revert to their sister, Rebecca, and to her heirs  
 lawfully begotten."

The first part of this quotation merely repeats in a condensed  
 shape what is to happen in the case of the death of one of the  
 sons without issue. Then follows the testator's disposition of the  
 property given to them in the event of both dying without lawful  
 issue. In such case it is to go to Rebecca and her heirs lawfully  
 begotten. I give the same construction to the words "dying  
 without lawful issue" when used in relation to both the sons  
 which I have given them in the earlier portion of the will—  
 that is to say, an indefinite failure of issue in so far as they  
 apply to Ballyellis, and a failure of issue of both on the death of

the survivor, in so far as they apply to the chattels real. Therefore, if both died without children, Rebecca would for the reasons I have already stated, when dealing with the previous executory bequests, take all the lands held for terms of years, absolutely, subject to the following provision:—"But in case all of my said children should depart this life without lawful issue, those several portions or denominations bequeathed to my son John are to revert to Robert Weldon, second son of my eldest brother, Robert Weldon, and his lawful heirs, but in failure of such issue then to the next son in priority of age, and so on successively in remainder; and those portions or denominations bequeathed to my son Thomas are to revert to my brother John Weldon's eldest son, and his heirs lawfully begotten, but, in failure of such, to his second or third son by priority of age, and so on successively in remainder."

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Holmes, L.J.

This concludes the disposing portion of the will; and I have to consider its effect in the light of subsequent events.

The three children survived the testator, who died in 1863. Rebecca, having married John Samuel Levis, died without issue in 1888. Thomas Weldon died unmarried in 1894; and by his will, made in the previous year, he bequeathed the lands of Cooline, taken by him under his father's will, to his cousin, Francis Weldon, and all the rest of his property to his brother John, who died without issue in 1907, having by his will given all his property to his widow, the plaintiff. There has, therefore, happened the event mentioned in the last clause I have read. All the testator's children departed this life without having had issue; and, accordingly, I am of opinion that the final executory bequest took effect. The chattels real bequeathed in the first instance to John, became vested in the defendant Robert Weldon, second son of the testator's eldest brother Robert; and the chattels real bequeathed to Thomas, the son, would now be vested in the eldest son of the testator's brother John, if he were living. I am in some doubt as to whether there is an executory bequest over in the event of the defendant Robert Weldon dying without issue living at his death. The gift is to him and his lawful heirs, but in failure of such issue then to the next son in



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priority of age. This question cannot be decided now, and it will probably never arise, as he has at present at least one child living, the defendant, Henry Bankes Weldon.

Holmes, L. J. Such a doubt does not, I think, arise in relation to the bequest to John Weldon's eldest son, and his heirs lawfully begotten, but in failure of such to his second or third son by priority of age, and so on successively in remainder. Here, I think, the chattels real vested absolutely in the brother John's eldest son, as the words "on failure of such"—that is of heirs lawfully begotten—are not within the 29th section.

It will be observed that, although the will is badly drafted, its language is almost entirely confined to words and phrases to which our law has attached a definite meaning; and I have construed it by strictly adhering to such meaning without speculating as to whether the testator attached that or any other meaning to them. At the same time I am satisfied that my construction carries out the general intention of the testator, which was to keep the lands in his own family as long as possible. This appears sufficiently from the elaborate provisions I have already read, as well as from the terse sentence that follows: "My further desire and will is that neither my said sons nor their heirs shall sell or dispose of any part of said bequeathed properties or estates, but to remain the *bona fide* properties of them and their heirs for ever." I observe that Ross, J., thinks that this clause, although otherwise inoperative, shows that "the testator desired that the estates conferred on each of his sons should descend to the respective heirs of the sons, meaning an estate tail continuing to the end of time, provided his sons have heirs."

I am unable to so construe the words quoted. There is nothing in the clause to create an estate tail in either son; and although the word "heirs," if it stood alone, would give each son an absolute estate in the lands taken by him, this would be quite inconsistent with the other gifts in the will. For example, the testator could hardly have supposed that the second son of his eldest brother who in certain events was to have his son John's lands, would be the latter's heir;

or that the son of a younger brother would be heir of his son Thomas.

The more I consider the complicated provisions of this will, the more I am convinced that the guide to their construction is to be found in section 29. Before the Statute of Wills, a gift to one person of lands subject to a proviso that, if he were to die without issue, the premises were to go to another, meant, save in certain exceptional cases, an indefinite failure of issue, with the result that the lands, if freehold estate, went to such person in tail, and if chattels real to him absolutely. I understand that section 29 altered the law for the purpose of making it for the future more in accordance with the presumed intentions of the testator. Whether this be so or not, there can be no doubt of the nature of the alteration. It is that the words "die without issue" or any other similar words shall import, not an indefinite failure of issue, but a want or failure of issue in the lifetime or at the death of the first taker. This is to be subject to a contrary intention appearing by the will by reason of certain specified matters to which I have already referred, and which in my opinion do not exist in the present case. My judgment rests on this section; and it becomes unnecessary for me to consider the subtle argument of Mr. Ronan, as to the effect of the executor of Rebecca's husband declining to argue in support of a claim on her part. Holding, as I do, that in the events that happened she had no title to the premises, I think that he was quite right in saying so.

I have only to add that, as Thomas Weldon bequeathed to Francis Cornwall Weldon the lands of Cooline, one of the chattels real taken by him under his father's will, and that as the appellants have intimated to the latter pending the appeal that they are willing to accede to this bequest, I hold that its validity cannot now be questioned.

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Cherry, L.J.

CHERRY, L.J. :—

I agree with the Lord Chancellor that the decision of Ross, J., was right and should be affirmed.

Reading this will as a whole, I think it is clear that the testator had in his mind one scheme or plan for the entire of his landed property, both real and chattel real. He has shown a clear intention, in the first place to divide that property between his two sons—then to allow the share of each to go in a course of devolution to the issue of each until there should be, if ever, an exhaustion of heirs of the body of both of his sons, and in that event, and that event only, to give all the property, whether real or personal, to his daughter Rebecca, “and her heirs lawfully begotten.” This intention is admittedly expressed as regards the real estate; and the gifts over of John’s share of the personal estate to Thomas, and of both shares to Rebecca, are in express terms to them and their “heirs lawfully begotten.” Now, as it has been laid down in clear terms in *In re Lowman, Devenish v. Pester* (1), a bequest of personalty to a person in tail is a gift to him absolutely, and a subsequent bequest of the same personalty to another person would be inoperative, if the first legatee should survive the testator. How then, if that be so, could John’s share of the personal property ever pass to Rebecca? and how could either share pass on her death to Robert Weldon, or to the eldest son of testator’s brother John? I think that the words of Brady, L.C., in the case of *Green v. Giles* (2), which has been referred to by the Lord Chancellor, apply with great force to the present case. He was there interpreting a will very similar in terms to the one we are asked to construe, and he says: “Now I think it is important here to look at the whole scope of this will; and when I do, it is impossible to avoid seeing that it was the intention of the testator that, so long as there should be issue of any of the previous devisees, the estate should not go over. That is certainly what he meant, and that would be a gift over upon an indefinite

(1) [1895] 2 Ch. 348.

(2) 5 Ir. Ch. R. 25.

failure of issue; . . . his primary intention was that the property should go to the whole line of issue of each devisee for life, and that is an intention which the law defeats" (1). The same clear general intention of the testator is to my mind present in this will.

Mr. Ronan quoted several cases, including *Forth v. Chapman* (2), and *Bamford v. Chadwick* (3), to show that the same words may be interpreted differently in the same will as regards real and personal estate, and that a gift over on failure of issue may thus be construed, in the one case as referring to a general failure of issue, and in the other, to failure of issue at death. I quite agree that such a construction may be applied, if it is clear that it carries out the testator's intention. But in the present case I think it would be entirely contrary to his intention.

As regards the argument based upon the use of the word "survivor" in the gift over to Rebecca, I think Mr. Murphy's answer to it was complete, namely, that the clause in which it occurs is merely a repetition of the previous gifts to testator's sons, and was not intended to alter their operation.

The 29th section of the Wills Act does not, in my opinion, apply to compel us to construe the words "die without issue" as referring to issue living at the death, inasmuch as a contrary intention does appear in the will, both in the earlier part of it, and more particularly in the last clause, to which Ross, J., attached so much importance: "And my further desire and will is that neither my said sons, John Henry Weldon, and Thomas Pyne Weldon, or their heirs, shall sell or dispose of *any part of* said bequeathed properties or estates, but to remain the *bona fide* properties of them and their heirs for ever." This clause clearly applies to both real and personal estate. It is plain that the testator in it uses the word "heirs" as a word of purchase and not of limitation. He intended that the descendants of his sons to the end of time should enjoy successive life estates in his property, according

*Appeal.*  
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(1) 5 Ir. Ch. R., p. 37.

(3) 2 W. R. 531.

(2) 1 P. Wms. 663.



*Appeal.* to priority of birth, and this intention the law does not permit to  
1910. be carried into effect.

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Solicitor for the plaintiff : *Patrick Ryan.*

Cherry, L.J. Solicitors for the defendants Lizzie Weldon and Hannah  
Sophia Josephine Dupré : *Meldon & Co.*

Solicitor for the defendant Francis Cornwall Weldon : *John  
Hawthorne.*

Solicitors for the defendants Robert Mackintosh Weldon and  
Henry Bankes Weldon : *Brown & M'Cann.*

Solicitor for the defendant Bruce Levis : *J. Travers Wolfe.*

R. ST. J. C.

IN RE ST. GEORGE GARDE BROWNE; A PERSON OF  
UNSOUND MIND.

L. C.  
1909.

Nov. 27.

*Perpetuity*—*Renewable Leasehold Conversion Act*, 1849 (12 & 13 Vict. c. 105)

1910.

—*Fee-farm grant*—*Covenant to fine down rent to a peppercorn, and to accept sixteen years' purchase of rent reserved.*

Feb. 10.

A covenant in a fee-farm grant made pursuant to the Renewable Leasehold Conversion Act (12 & 13 Vict. c. 105), giving liberty to the grantee, his heirs and assigns, to fine down the rent to a peppercorn, upon payment of sixteen years' purchase of the rent, is not void as offending against the rule against perpetuities.

MOTION :—

By a lease for lives renewable for ever, dated the 2nd November, 1791, part of the lands of Farrenverdowney, in the city of Cork (now known as St. Patrick's Hill), were demised by Isaac Kingston to Robert Kingston to hold for three lives therein named and the survivors or survivor of them, and the lives of such other persons as should thereafter be added pursuant to the covenant for perpetual renewal therein contained, at the yearly rent of £42 sterling, and containing a covenant to fine down the said rent to a peppercorn rent on payment of sixteen years' purchase of the rent.

This lease was converted into a fee-farm grant under the provisions of the Renewable Leasehold Conversion Act by a grant, dated the 11th August, 1865, made by the then owners of the reversion, William Wiley, LL.D., Anna Crofton, otherwise Singer, the Reverend Edward Haddock, and Pauline Haddock, otherwise Singer, to William Garde Browne. This fee-farm grant contained the covenant to fine down the rent, which had been transferred from the lease to the fee-farm grant, and was in the following terms:—"And it is hereby covenanted and agreed upon by and between each of them the said William Wiley, Anna Crofton, Edward Haddock, and Pauline Haddock, of the one part,

*L. C.* for himself and herself, and as to his and her own acts only, and  
 1909. the said William Garde Browne, of the other part, and their several  
*In re* and respective heirs and assigns, that he, the said William Garde  
*GARDE* Brown, his heirs and assigns, shall, and may at any time hereafter,  
*BROWNE.* during the estate hereby granted, have liberty to fine down and  
 reduce the aforesaid yearly rent of £42 to the yearly rent of one  
 peppercorn upon the said William Garde Browne, his heirs and  
 assigns paying unto the said William Wiley, Anna Crofton,  
 Edward Haddock, and Pauline Haddock, their heirs and assigns  
 sixteen years' purchase, and not more, for the said yearly rent of  
 £42, and that the said William Wiley, Anna Crofton, Edward  
 Haddock, and Pauline Haddock, their heirs and assigns, shall  
 accept sixteen years' purchase for the same; and that, from and  
 immediately after such payment and acceptance, the yearly rent  
 of the said premises shall be one peppercorn only, in place and  
 stead of the said reserved yearly rent of £42."

By another lease for lives renewable for ever, of the same date,  
 and made between the same parties, another portion of the said  
 lands was demised for the same term and at a like rent of £42.  
 This lease was converted into a fee-farm grant by a grant of the  
 same date, and made between the same parties as the other grant,  
 and contained a similar covenant enabling the grantee to fine  
 down the rent of £42.

The grantee's interest in these two fee-farm grants became  
 vested in St. George Garde Browne, who, by order of the Lord  
 Chancellor of the 17th August, 1897, was declared to be a person  
 of unsound mind and incapable of managing his person and  
 property. By a further order of the Lord Chancellor, Fanny  
 Jane Garde Browne was appointed committee of the estate of  
 St. George Garde Browne. In 1907, application was made to  
 the grantors' solicitors for performance of the covenants to fine  
 down the rents and that title should be furnished for that purpose.  
 After some time title was furnished and requisitions made; but on  
 the 13th May, 1909, the grantors' solicitors wrote stating that  
 their counsel had advised that the covenants to fine down the  
 rents were invalid as infringing the rule against perpetuities,  
 and that, therefore, the fining down of the rents could not be  
 proceeded with.

On the 12th November, 1909, a notice of motion on behalf of the committee of the estate was instituted before the Lord Chancellor, asking for the following relief—(1) A declaration that the committee was entitled to fine down the rents of £42 and £42 reserved by the two fee-farm grants of the 11th August, 1865, from William Wiley and others to William Garde Browne, to the yearly rent of one peppercorn upon payment of sixteen years' purchase of the said rents, pursuant to the covenants in the said fee-farm grants contained; (2) that in the event of the persons claiming to be the representatives of the grantors in the said fee-farm grants mentioned failing to make title to the said rents the committee might be at liberty to lodge in Court the purchase-money of the said rents; (3) that the costs of the committee be paid by the representatives of the grantors.

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On the hearing of the application counsel for the grantors consented to the question of the validity of the covenant being determined by the Lord Chancellor.

*Conner, K.C., and Norwood*, in support of the motion:—

The covenant in the lease was properly inserted in the fee-farm grant: *M'Naul's Estate* (1). It is not void under the rule against perpetuities. It is not an option to purchase the fee at any time, but merely to fine down the rent. *Tyrrell's Estate* (2) may be relied on, but that was the case of an option to redeem a rent-charge, and is different from a provision for fining down the rent, which has not been decided to be obnoxious to the rule; see *per Fitz Gibbon, L.J.*, at p. 299.

*Jellett, K.C., and Brunskill*, for the grantors:—

The covenant is void because there is no time limit; the effect of it would be to give an interest in land: *Woodall v. Clifton* (3). It was not a covenant concerning the tenancy or its terms, but an option to purchase during the lease, as the peppercorn rent would be ignored. Though *M'Naul's Estate* (1) decided that any

(1) [1902] 1 Ir. R. 114.

(2) [1907] 1 Ir. R. 292.

(3) [1905] 2 Ch. 257.



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covenant running with the land should be inserted in the fee-farm grant, this was not such a covenant, and, therefore, sect. 10 of the Renewable Leasehold Conversion Act did not apply. The principle of *London and South-Western Railway Co. v. Gomm* (1) applies. *Tyrrell's Estate* (2) is in our favour. Your Lordship there referred with approval to *Woodall v. Clifton* (3) and *Worthing Corporation v. Heather* (4), as showing that an option to purchase given to a lessee and exercisable at an indefinite time is void for perpetuity.

*Norwood*, in reply:—

The observations of Romer, L.J., in *Woodall v. Clifton* (3) support our contention. The covenant is one concerning the tenancy and its terms, and the fact that the rent is to be reduced to a peppercorn cannot make any difference. The covenant in the lease was not bad; it was a lease for three lives.

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THE LORD CHANCELLOR:—

In this case I consented, at the request of the parties, to decide the question between them, in order that the expenses of an action might be avoided.

The question is the following:—

By a lease for lives renewable for ever, dated the 2nd of November, 1791, the lands with which the case is concerned were demised by Isaac Kingston to Robert Kingston, to hold for three lives therein named, and the survivors and survivor of them, and the lives of such other persons as should thereafter be added, pursuant to the covenant for perpetual renewal therein contained, at the yearly rent of £42 sterling.

This lease was converted into a fee-farm grant under the provisions of the Renewable Leasehold Conversion Act by a grant dated the 11th of August, 1865, made by the then owners of the reversion to William Garde Browne.

(1) 20 Ch. D. 562.

(2) [1907] 1 Ir. R. 292.

(3) [1905] 2 Ch. 257.

(4) [1906] 2 Ch. 532.

This fee-farm grant contains a covenant which has been transferred from the lease to the fee-farm grant in the following terms :—“ And it is hereby consented and agreed upon by and between each of them the said William Wiley, Anna Crofton, Edward Haddock, and Pauline Haddock of the one part, for himself and herself, and as to his and her own acts only, and said William Garde Browne of the other part, and their several and respective heirs and assigns, that he the said William Garde Browne, his heirs and assigns, shall and may at any time hereafter during the estate hereby granted have liberty to fine down and reduce the aforesaid yearly rent of £42 to the yearly rent of one peppercorn upon his the said William Garde Browne, his heirs and assigns, paying unto the said William Wiley, Anna Crofton, Edward Haddock, and Pauline Haddock, their heirs and assigns, sixteen years' purchase, and not more, for the said yearly rent of £42, and that the said William Wiley, Anna Crofton, Edward Haddock, and Pauline Haddock, their heirs and assigns, shall accept of sixteen years' purchase for the same; and that, from and immediately after such payment and acceptance, the yearly rent of the said premises shall be one peppercorn only, in the place and stead of the said reserved yearly rent of £42.

This covenant was rightly transferred from the original lease to the fee-farm grant under the decision of the Court of Appeal in *M'Naul's Estate* (1).

The committee of the estate gave notice of her desire to exercise the right of fining down the rent under this covenant, and a reduced rent was accepted for some years without prejudice to the right; and title was furnished and accepted with the view of having the fining down legally carried out.

However, the solicitors for the landlord broke off all negotiations, on the ground that they were advised that the covenant was illegal, and did not bind the landlord, and I am now to decide the legal question whether the covenant is void as offending against the rule against perpetuities?

Mr. Jellett contended that it did, on the ground that it was unlimited in time, and that it created an equitable interest in

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(1) [1902] 1 Ir. R. 114.

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land; and, therefore, the decisions in *London and South-Western Railway v. Gomm* (1) and *Woodall v. Clifton* (2) applied, and compelled me to decide against the validity of the covenant, especially as the case was between an assignee of the lease and an assignee of the reversion.

It may be difficult to state any logical reason why covenants for renewal, and to fine down rent, should stand on any different footing from such an option as was given in *Gomm's Case* (1) or in *Tyrrell's Estate* (3); but there has been from long usage an exception, recognized at all events in Ireland, in the case of covenants for renewal and to fine down rent, which it is too late to call in question unless, perhaps, in the court of ultimate appeal.

I certainly do not feel justified in deciding against the validity of such covenants, and, accordingly, I hold that the covenant is binding and valid; and, therefore, it is not necessary to rest a judgment upon the acts of the parties, and the correspondence, which have all proceeded on the assumption that the covenant was binding: and might, perhaps, be sufficient to ground an action for specific performance.

But, on the legal question, I decide in favour of the committee of the estate, and regret that, at almost the last moment, this legal point was raised.

Solicitors for the committee: *Dealy & White*.

Solicitors for the grantors: *Collis & Ward*.

W. L.

(1) 20 Ch. D. 562.      (2) [1905] 2 Ch. 257.      (3) [1907] 1 Ir. R. 292.

IN THE MATTER OF THE ESTATE OF THE RIGHT HON.  
 RICHARD JOHN WALTER, EARL OF DONOUGH-  
 MORE.

Wylie, J.  
 1911.

April 27.

*Perpetuity*—Grant of rentcharge for long term of years for charitable purposes  
 —*Proviso as to redemption*—No limit as to time for redemption.

By an indenture made in 1747 an annuity or yearly rentcharge of £15 issuing out of certain lands was granted to M. J. and J. B., and the survivor of them, and the executors, administrators, and assigns of the survivor, for the term of 999 years, from the death of the grantor, which said annuity was subsequently declared to be upon trust for J. P., or such other person as for the time being should have the pastoral care of the congregation of the dissenting Protestants of the town of C. The said indenture contained a proviso that if the heirs, executors, administrators, or assigns of the grantor should on any of the days named for payment of the said annuity pay unto M. J. and J. B., or the survivor of them, or the executors, administrators, or assigns of the survivor, the sum of £300, in one payment, the said annuity should be no longer payable, but should determine.

*Held*, that the said proviso was void as violating the rule against perpetuities.

*In re Tyrrell's Estate*, [1907] 1 I. R. 292, applied.

QUESTION OF LAW arising on application to redeem an annuity of £15 (Irish) charged upon portion of the lands sold in this matter.

By indenture dated the 27th November, 1747, and made between Richard Hutchinson of the one part, and Mathew Jacob and John Bagwell of the other part, the said Richard Hutchinson granted unto the said Mathew Jacob and John Bagwell, their executors, administrators, and assigns, one annuity or yearly rentcharge of £15 to be received and issuing out of all that and those the town and lands of Knocklofty, then in the said Richard Hutchinson's possession, situate in the barony of Iffa and Offa, and county of Tipperary, to have, hold, and enjoy the said annuity or yearly rentcharge of £15, unto the said Mathew Jacob and John Bagwell, and the survivor of them, and the executors, administrators, and assigns of the survivor of



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them, for and during the full term of 999 years, commencing from the day of the death of the said Richard Hutchinson, and payable as therein mentioned. The said deed contained a power of distress, and a covenant for payment of the said annuity, and also a proviso in the following terms:—"Provided always, and those presents are upon this condition nevertheless, and it is the true intent and meaning hereof, and of the parties hereto, that if the heirs, executors, administrators, or assigns, of the said Richard Hutchinson shall, on any of the before-mentioned days of payment, after the decease of the said Richard Hutchinson, pay or cause to be paid unto the said Mathew Jacob and John Bagwell, or the survivor of them, or the executors, administrators, or assigns of the survivor of them, the full sum of £300 sterling, good and lawful money of Great Britain, in one entire payment, over and above all arrears of the said annuity that shall be then due, then, and in such case, and from thenceforth the said annuity or yearly rentcharge of £15 sterling hereby granted, or any part thereof, shall be no longer payable, but shall determine and be utterly void, anything herein contained to the contrary notwithstanding."

By indenture dated the 1st May, 1816, and made between James C. Jacob of the first part, the Rev. James Worrell of the second part, and the Right Hon. William Bagwell, William Riale, Charles Riale, and Mathew Jacob of the third part, reciting (*inter alia*) an assignment of said annuity made in 1747, and a certain deed-poll, dated the 14th October, 1761, whereby it was declared that the said assignment was upon the trusts and for the intents and purposes, "that the said annuity should be payable unto the Rev. John Patten, or unto such other person as for the time being should have the pastoral care of the congregation of the dissenting Protestants of the town of Clonmel, and the part adjacent, for or towards the support of such pastor, who should be permitted from time to time to take the said annuity while he should continue to be such pastor of such congregation," the said annuity was assigned to the said parties thereto of the third part, their executors, administrators, and assigns, for the residue of the said term of 999 years, nevertheless in trust for the person, the pastor of the congregation of dissenting Protestants at Clonmel for the time being, according to the true intent

and meaning of the indentures thereinbefore recited. The said annuity had since been regularly paid. The said town and lands of Knocklofty had been sold in this matter under the Land Purchase Acts, and on an application to redeem and fix the redemption price of the said annuity, the question now arose as to whether the proviso in the said indenture of the 27th November, 1747, purporting to fix the redemption price was not void as violating this rule against perpetuities?

The present trustees of the said indenture of the 1st May, 1816, were Richard Bagwell and the Rev. Robert John Orr.

*Denis Henry, K.C.*, for the vendor:—

The annuity here was granted for a term of years, and is not a perpetual annuity as in *In re Tyrrell's Estate* (1). This case is covered by *Switzer v. Rochford* (2), in which John Cooke granted a rentcharge of £30 per annum for a term of 500 years to trustees upon certain trusts, and charged it on leasehold premises, with a proviso that it should be lawful for the grantor, his executors, administrators, or assigns, at any time during the 500 years to purchase or redeem the annuity for £300 (Irish) which was then to determine and be void, and it was held that the proviso was not void for remoteness. That decision, although adversely commented on by the Court of Appeal in *In re Tyrrell's Estate* (1), has not been expressly overruled.

*James Andrews*, for Richard Bagwell and the Rev. Robert John Orr:—

The decision in *Switzer v. Rochford* (2) was incorrect. Though not expressly overruled, it was not followed in *In re Tyrrell's Estate* (1), a decision which governs this case. The decision in *Switzer v. Rochford* (2) is contrary to principle, and is not in accordance with the general current of authority. The sole question is whether the proviso infringes the rule against perpetuities? This proviso is in effect an executory limitation of the annuity which will not necessarily vest within the period prescribed by law for the creation of future interests. It is therefore a perpetuity: see *Lewis on Perpetuity* (3) and *Woodall v. Clifton* (4). The form in

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(1) [1907] 1 I. R. 292.

(2) [1906] 1 I. R. 399.

(3) At p. 164.

(4) [1905] 2 Ch. D., at p. 259.

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which the annuity is created is immaterial, as is also the suggested difference between a perpetual annuity and one for a term of years only. In either case the right to redeem under the proviso might be exercised subsequent to the period prescribed by law, and the proviso is, therefore, wholly void. [He also cited *London and South-Western Railway Co. v. Gomm* (1) and *Worthing Corporation v. Heuther* (2).]

*W. E. Wylie* appeared for the Rev. R. W. Rentoul, a claimant to the annuity.

*T. H. Maxwell* appeared for the Commissioners of Charitable Donations and Bequests.

WYLIE, J. :—

In my opinion, this case is indistinguishable from *In re Tyrrell's Estate* (3). There is, in effect, a limitation of the annuity to these trustees, their executors, administrators, and assigns, and, on the happening of an event which may occur at any time within 999 years, a limitation over. The proviso clearly violates the rule against perpetuities, as interpreted in recent cases, and is, therefore, void. The parties are, accordingly, at large, for the purpose of fixing the redemption price.

Solicitor for the vendor: *R. A. Macnamara*.

Solicitors for Richard Bagwell and Rev. Robert John Orr :  
*Hone & Falkiner*.

Solicitor for Rev. R. W. R. Rentoul: *J. C. Ryan*.

Solicitors for the Commissioners of Charitable Donations and Bequests: *Maxwell, Weldon & Co.*

J. E. W.

(1) 20 Ch. D. 562.

(6) [1906] 2 Ch. 532.

(3) [1907] 1 I. R. 292.

IN THE MATTER OF THE ESTATE OF JOSEPH JOHNSTON  
CONTINUED IN THE NAME OF MARY JOHNSTON, OWNER;  
THOMAS ELLIOTT, PETITIONER.

Ross, J.

1911.

May 1.

*Fee-farm grant under Renewable Leasehold Conversion Act, 1849 (12 & 13  
Vict. c. 105)—Habendum—Omission of words of limitation—Estate in  
fee-simple—Intention.*

The Renewable Leasehold Conversion Act contemplates an estate in fee-simple being vested in the grantee. Where, therefore, in the habendum to a fee-farm grant made pursuant to the provisions of the said Act, words of limitation were omitted as regards certain of the grantees:—

*Held*, having regard to the intention, that the grantees took an estate in fee-simple in the lands.

QUESTION arising on rulings of title of the Examiner.

By indenture dated 30th July, 1901, made between Charles Howe Knox, of the one part, and Mary Elizabeth Johnston, George Hamilton Johnston, guardian *ad litem* of Charles Johnston, a minor, and Lieutenant Colonel Henry Irvine, the receiver appointed over the lands for sale in the matter of the estate of Joseph Johnston, owner, continued in the name of said Mary Elizabeth Johnston, owner, Thomas Elliott, petitioner, and in the matter of the estate of Charles Johnston, a minor, by George Johnston, his guardian *ad litem*, owner, James Johnston, petitioner, reciting that, by indenture dated 1st May, 1813, and expressed to be made between Charles Knox, of the one part, and Joseph Johnston, of the other part, all and singular the premises were demised by the said Charles Knox unto the said Joseph Johnston, his heirs, and assigns, to hold for the three lives therein named, with a covenant for perpetual renewal of the said lease on the fall of each life, and reciting that the said Charles Howe Knox was then the owner of the reversion expectant on the determination of the said lease within the meaning of the Renewable Leasehold Conversion Act, and that the said Mary Elizabeth Johnston, and the said George Hamilton Johnston, as such



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guardian *ad litem*, and the said Henry Irvine, as such receiver, were then the owners of the said lease within the meaning of the said Act, and reciting that the said Charles Howe Knox had agreed to execute a grant of an estate of an inheritance in fee-simple of the hereditaments and premises under the provisions of the said Act, the said indenture witnessed that in pursuance of the said agreement and in consideration of the yearly fee-farm rent, covenants and conditions thereafter reserved, and under and by virtue of the provisions of the Renewable Leasehold Conversion Act, he, the said Charles Howe Knox, did grant unto the said Mary Elizabeth Johnston, her heirs and assigns, and to the said George Hamilton Johnston, as such guardian, and to the said Henry Irvine, as such receiver, the hereditaments and all other the premises comprised in the said indenture of 1st May, 1813, that is to say (parcels), to have and to hold all and singular the hereditaments, and all other the premises thereinbefore expressed to be thereby granted unto the said Mary Elizabeth Johnston, her heirs and assigns, and to the said George Hamilton Johnston, as such guardian, and to the said Henry Irvine, as such receiver, as tenants in common, for ever yielding and paying therefor and thereout yearly and every year during the continuance of the said grant unto the said Charles Howe Knox, his heirs and assigns, the yearly fee-farm rent therein stated, with the usual covenants for payment of the rent.

The Examiner by his rulings on title raised a query as to the estate vested in Charles Johnston in the lands for sale in the matter, and the case now came into the Land Judge's list for decision.

*H. Morgan Byrne*, for the petitioner having carriage :—

Words of limitation are not necessary to pass the entire estate in a lease for lives renewable for ever, if in the deed other words are used or declarations made conveying the whole estate of the grantor: *Brenan v. Byrne* (1): Words of limitation are not essential in fee-farm grants under the Renewable Leasehold Conversion Act. By section 1 of that Act, the owner of the reversion is required

to grant to the owner of the lease "an estate of inheritance in fee-simple," though he may not have in himself such an estate. The Act says that the grant shall be made to the owner of the lease, not to him "and his heirs"; and by section 37 the grant is to operate as a conveyance to the lessee, his heirs and assigns, for ever. The exceptions to the necessity to use the word "heirs" are set out in Norton on Deeds, p. 302. The 6th exception states that the rule as to the use of the word "heirs" does not apply to certain releases. A valid fee-farm grant can be executed of the whole premises to one of several owners of a lease in perpetuity with the assent of the others in trust for himself and them: *In re Abbott's Estate* (1). In a deed of this kind the intention of the parties to the deed ought to be carried out, even though the proper words of limitation are absent: *In re Ottley's Estate* (2); *In re Stinson's Estate* (3).

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Ross, J. :—

I have no doubt as to what I ought to do in this case. The Renewable Leasehold Conversion Act was enacted to get rid of the trouble and expense of constant renewals of leases containing covenants for perpetual renewal. It created an estate in fee-simple in the rent in the former lessor and an estate in fee-simple in the lands in the former lessee. In a deed made under the Act the only estate contemplated as regards the grantee is an estate in fee-simple. In the present deed the word "heirs" has been omitted, but, the intention being clear, I should be prepared if necessary to reform the deed and insert the word "heirs." It is not necessary to reform the deed formally. I can read it according to its real meaning, and declare that the grantees took an estate in fee-simple in the lands.

Solicitor for the petitioner: *F. Gifford & Son.*

D. M. S.

(1) Ir. R. 11 Eq. 268. (2) [1910] 1 I. R. 1. (3) *Ibid.* 47.

Wylie, J. IN THE MATTER OF THE ESTATE OF SIR KILDARE  
BORROWES, BART.

1910.  
Dec. 13, 14.

1911. *Land Purchase—Estates Commissioners—Jurisdiction—Superior interests—  
Jan. 12. Price—Demesne land—Irish Land Act, 1903, sections 3 (1), 5, 17.*

*Appeal.*

1911.

Feb. 15.

April 25.

Where a vendor has given *prima facie* evidence of title under section 17 of the Irish Land Act, 1903, the Estates Commissioners have jurisdiction to deal with him as owner for the purpose of effecting a sale, without inquiry as to the amount of redemption prices of superior interests, and as to the sufficiency of the purchase-money to satisfy and redeem such superior interests in full. There is no distinction in this respect between the jurisdiction of the Commissioners in the purchase of demesne land under section 3 (1) of the Irish Land Act, 1903, and of any other land which, under that statute, they have power to acquire.

The Commissioners in exercising this jurisdiction are the sole judges of what price represents the selling value of such demesne land, and of whether, having regard to all the circumstances of the case, the agreed price is equitable.

Upon these questions the owner of a superior interest may properly be heard before the Commissioners, and if the superior interest affects only part of the demesne land sold, it may be proper to determine separately the selling value of that part. But the Commissioners have jurisdiction to proceed with the sale although the purchase-money may eventually prove insufficient to redeem a superior interest at the price fixed by the Judicial Commissioner. In such last-mentioned contingency, *semble*, *per* Cherry, L.J., any collateral security such as a covenant to pay a head-rent would not be affected.

A memorandum was submitted by the Estates Commissioners to Mr. Justice Wylie as Judicial Commissioner, setting out the facts, which are sufficiently stated in his Lordship's judgment, *infra*, p. 219, and referred for his decision the following questions :—

(1) Whether the Commissioners had power under section 3 of the Irish Land Act, 1903, to purchase from the vendor for the purpose of re-sale to him the lands of Grangemore in his occupation as tenant under a lease, dated 3rd August, 1866, from

Rev. William Morris Colles to Robert Higginson Borrowes, predecessor in title of the vendor?

*Wylie, J.*  
1910.

(2) Whether it was the duty of the Commissioners to determine the price representing the selling value of the Grangemore leasehold?

*In re*  
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(3A) Whether if (2) is answered in the affirmative the Commissioners are bound to form an opinion as to whether the purchase-price will be sufficient to redeem the head-rent?

(3B) In forming this opinion, are the Commissioners bound to inquire whether the lessor has any security for the rent beside the lands?

(4) If the Commissioners are of opinion that the purchase-money will not be sufficient to redeem the head-rent, are they bound to refuse to make any advance in respect thereof?

*Conner, K.C., and Jefferson, K.C., for Mr. William Morris Colles.*

*The Solicitor-General, A. C. Meredith, K.C., and R. Grove-White, for the owner.*

WYLIE, J.:—

1911.

Jan. 12.

By an indenture of the 3rd August, 1866, the Rev. William Morris Colles granted and demised part of the lands of Grangemore, containing about 80 acres, to Robert Higginson Burrowes, in fee, subject to the yearly rent of £150, and said deed contained a personal covenant by the grantee for payment of said rent. In 1893, on an application by the grantee for the redemption of this rent, under the Redemption of Rent (Ireland) Act, 1891, it was decided that the demised lands had become incorporated in the grantee's demesne of Gilttown, and were, therefore, excluded as demesne lands, both from the Redemption of Rent Act and the fair rent provisions of the Land Law Acts.

On the 29th June, 1905, the vendor, a successor in title to said grantee, lodged an originating application for the sale to his tenants of the tenanted portion of his estate, and for the sale to the Land Commission and re-purchase of the demesne lands in his occupation, including the lands comprised in said fee-farm



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1911.  
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grant. The vendor subsequently gave *prima facie* evidence that he was a person having power to sell the said demesne lands under the Land Purchase Acts, and satisfied the Land Commission that, for not less than six years immediately preceding, he, or his predecessors in title, had been in receipt of the rents and profits thereof; and, accordingly, on the 26th February, 1909, the Land Commission published the prescribed notices of their intention to acquire said demesne lands, and served same upon William Morris Colles, who was then entitled to the interest of the grantor under said fee-farm grant.

On the 28th May, 1909, the said William Morris Colles lodged an objection in these terms:—"I object to the said vendor being dealt with as the owner of the lands of Grangemore in said county, forming part of the demesne and lands herein, or the vesting of said demesne and lands in the Land Commission, or otherwise, inasmuch as portion of the said lands for sale is held by the said vendor under a lease for ever, bearing date the 3rd August, 1866, at the yearly rent of £150, and that such lands are in the actual occupation of the said vendor, and form part of the demesne of Giltown, part of same being ornamental plantations, and that, as such, the said rent, being an occupation, and not a head-rent, cannot be redeemed."

The Estates Commissioners, either treating this objection as being invalid, or overlooking it, proceeded to value the demesne lands, and estimated the selling value of the entire lands at £19,022, no separate valuation being made of the lands comprised in said fee-farm grant, and the vendor having agreed to this price, the Estates Commissioners on the 10th August, 1909, gave a fresh notice that, unless cause was shown to the contrary within two months, the Land Commission intended to make an order vesting said lands in the Land Commission for the purpose of re-sale to the vendor.

On the 9th October, 1909, Mr. Colles gave fresh notice of his objection in the same form as the above objection of the 28th May, 1909.

Now, there are only three grounds of objection stated in that notice—First, that portion of the lands are held by the vendor under a lease for ever at a rent of £150. That is obviously an

invalid objection. No one had ever suggested, or contended in Court, that a fee-farm grantee holding at a rent cannot sell, and be dealt with as an owner, under the Land Purchase Acts.

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1911.  

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*In re*  
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The second ground of objection is that such lands are in the actual occupation of the vendor, and form part of his demesne, including ornamental plantation. Why, that is the very ground on which he is empowered to sell and re-purchase under section 3 of the Act of 1903.

The third ground of objection is that the said rent, being an occupation and not a head-rent, cannot be redeemed. I presume that means that the head-rent is not a "superior interest." Now the meaning of "superior interest" within the Land Purchase Acts has been so fully dealt with and discussed in the judgments in *Owen's Estate* (1) (No. 3), that I do not think it necessary to discuss it further. It is enough to say that this rent "is payable or to be rendered in respect of the land sold," and is, therefore, expressly within the definition of "superior interest" in section 31 of the Act of 1896.

Consequently, every ground of objection stated on the face of the notice is bad.

But on the hearing of the objection before the Estates Commissioners, and also before me, the grounds of objection stated in the notice were practically abandoned, and two new grounds of objection were relied upon. In the first place, it was contended that, inasmuch as it was practically immaterial to the vendor whether the purchase price fixed for these demesne lands was the full true selling value or not, Mr. Colles, as the only person interested in the amount of the purchase price of that portion of the demesne lands comprised in the fee-farm grant, by reason of the redemption value of the reserved rent of £150, secured as it is by personal covenant, being much more, as is alleged, than the value of the said lands, was entitled to know how much of the total purchase-money represented the selling value of the portion of the lands comprised in the fee-farm grant.

This claim to have a separate value put on said portion of

(1) [1900] 1 I. R. 151.

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1911.  
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BORROWES'S  
ESTATE.

the lands was based on two grounds. First, that Mr. Colles, as the only interested party, might be able to see, and, if necessary, be heard on the question, whether the price fixed was the full selling value. Now this claim, on the ground mentioned, is I think one that no tribunal would refuse to entertain; and I am quite certain, if Mr. Colles had made any such claim at the proper time, that the Estates Commissioners would at once have complied with it; and I have no doubt they will do so still, because ultimately, for the purpose of distribution, the value of these lands must be separately fixed. The second ground on which Mr. Colles claims to have the purchase price of these particular lands separately fixed is, that he is entitled to see whether the purchase-money applicable to these lands will be sufficient to satisfy or discharge the redemption price of the rent of £150—because, if not sufficient, he then contends that the vendor cannot sell, and the Land Commission cannot buy, this portion of the demesne under the Land Purchase Acts.

This brings me to the only question that I have really to decide in this case, because upon the proper answer to this question depend the answers to the other questions submitted to me. The main question may be broadly stated thus:—Where a person proposing to sell land has given clear *prima facie* evidence that he is a person having power to sell under the Land Purchase Acts, and has satisfied the Land Commission that, for more than six years immediately preceding, he and his immediate predecessors in title have been in receipt of the rents and profits of the land, can the Estates Commissioners deal with him as owner of the land for the purpose of effecting a sale, without an inquiry as to the amount of the redemption prices of superior interests and as to the sufficiency of the purchase-money to satisfy all such redemption prices, if the owner of a superior interest has objected to the sale on that ground?

I will only say, in passing, that, if this question must be answered in the negative, it will put a most effectual stay upon land purchase, and entirely thwart the policy of the Act of 1903, the chief object and purpose of many of the provisions of which were to enable the new tribunal, constituted by the Act for carrying through sales of estates, to get rid of all the difficulties and delays occasioned by such inquiries as that suggested.

The answer to the question, however, must depend upon the true construction of the provisions of the Land Purchase Acts relating to sales, and more especially the provisions of the Act of 1903.

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1911.  
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ESTATE.

Now section 31 of the Act of 1896 enacted that "where any land has been sold under the Land Purchase Acts, . . . and an advance under said Acts is made for the purpose of such sale, the sale of such land shall be made discharged from all superior interests as defined by this section, and in every such case the land shall be vested in the purchaser in fee-simple, and such superior interests or the value thereof shall become a lien upon, and be redeemed or satisfied out of, the purchase-money." The chief argument presented to me on behalf of Mr. Colles was based on the concluding words of this clause—"shall be redeemed or satisfied out of the purchase-money." It was contended that these words implied that, where the purchase-money was not sufficient to redeem and satisfy all superior interests, the vendor could not sell. But such a contention is in conflict with the judgments of the Court of Appeal in *Owen's Estate* (1), where the effect of this clause and of the previous legislation is so fully discussed. Although the question of the insufficiency of the purchase-money, did not arise in that case, still, after showing that the effect of the section was, in the case of every such sale, to transfer all claims in respect of superior interests from the land to the purchase-money, Walker, L.J., said:—"The purchase-money, so far as it exists, is made distributable," and Holmes, L.J., said, "It may be that there is no such money, in which case there can be neither redemption nor satisfaction." And the very question, whether a sale should be stayed, in case it appears that the purchase-money will be insufficient to redeem and satisfy superior interests, came up for argument and decision in *Irvine's Estate* (2). The facts of that case are stated shortly in the head-note, thus:—"The lands of A were sold in the Landed Estates Court, with the liability of indemnifying the lands of B from a perpetual annuity affecting both. The indemnity was then sufficient. The owner of A proposed to sell to his tenants

(1) [1900] 1 I. R. 151.

(2) [1903] 1 I. R. 41.



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under the Land Purchase Acts, and the owners of portion of B objected, on the ground that the interest of the purchase-money would not be sufficient to meet the annuity." Mr. Conner for the objector in that case made use of the same arguments that he pressed upon me so vigorously in this case, but the Master of the Rolls held that the sales should be proceeded with, and in giving judgment, at p. 46, says:—"Am I then to declare that a landlord, who is qualified and entitled under the Land Purchase Acts to sell to his tenants, must refrain from selling, unless he can realize a price sufficient to redeem or satisfy in full the demands of all persons concerned directly or indirectly in the 'superior interests' affecting the lands sold? I do not thus read the 31st section or the decision of the Court of Appeal in *Owen's Estate* (1). It often happens that someone is left out in the cold when the purchase-money of property sold under the Land Acts comes to be distributed." That judgment seems to me to give a clear affirmative answer to the question I have to decide, in the case of direct sales, even under the provisions of the Land Purchase Acts prior to the Act of 1903.

But whatever doubt there might have been on this question under the former Acts, I think the whole policy and provisions of the Act of 1903 put this matter beyond controversy. This Act has drawn a clear dividing line between the proceedings up to completion of sale and the proceedings relating to distribution of the purchase-money, and has constituted a new tribunal, consisting of three Estates Commissioners, with exclusive jurisdiction over all matters relating to the carrying out and completion of sales. Until they have sanctioned the sale, vested the lands, and advanced, or agreed to advance, the purchase-money, no question can arise as to its distribution or as to the redemption value of superior interests, nor have the Estates Commissioners any power or jurisdiction to deal with these matters. In the great mass of cases that come within section 1, sub-section 1, known as 'Zone Cases,' the question of the sufficiency of the purchase-money for any purpose could not arise, because the Estates Commissioners are bound to sanction the sale and advance

(1) [1900] 1 I. R. 151.

the money, without any inquiry into its sufficiency, if they are satisfied as to *prima facie* title, and declare the estate. And in case of sales to the Land Commission under section 6, if the Estates Commissioners are satisfied that the lands are fit to be regarded as a separate estate for the purposes of the Act, and that the vendor is *prima facie* an owner within the meaning of section 17, they themselves fix the price they are willing to give for the estate, having regard only to the value of the land and the prices which tenants and others are willing to give for it, as required by section 6, and without any reference whatever to the nature, extent, or value of the "superior interests." Then, when they have agreed to purchase, they make a vesting order, which by section 16 is effectual to vest in the Land Commission the fee-simple of the land purchased, subject as in said section mentioned, but discharged from the claims of all persons who are interested in the land, whether in respect of superior, or intervening interests, or incumbrances, or otherwise; and all such claims, as from the date of the vesting order, cease as against the land, and attach to the purchase-money in like manner as immediately before the date of the order they attached to the land. There is nothing in that section, or in any of the twenty-three sections, in respect of which the Estates Commissioners have jurisdiction, with reference to the redemption or satisfaction of superior interests. It is only when we come to section 24—the distribution section—that the statute, by subsection 6, provides that the Land Commission shall, as soon as practicable, distribute the purchase-money to the persons entitled thereto, whose claims upon that money have been ascertained, and for the purpose of such distribution may ascertain, in the prescribed manner, the amount or value of any such claim, and discharge, redeem, or satisfy the same out of the said money. That, of course, must mean—according to their proper priority—as far as the money will extend.

Therefore, it seems to me clear that, under the Act of 1903, neither in direct sale cases, nor in sales to the Land Commission, under sections 6, 7, or 8, are the Estates Commissioners bound, nor are they under any duty, to inquire into the value of superior interests, nor have they any jurisdiction to ascertain their value.

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Can it then make any difference that the present sale, which is objected to, is under section 3 of that Act? That section, which, for the first time, enables an owner to sell and re-purchase land in his own occupation by means of an advance under the Land Purchase Acts, is in these terms:—"Where the owner of an estate has entered into agreements under the Land Purchase Acts for the sale to persons other than the Land Commission of the estate, the Land Commission may purchase from him any demesne or other land in his occupation, and adjacent to, or in the neighbourhood of, the estate, at a price which, in their opinion, represents the selling value of that land, and in such case may re-sell the whole or any portion of that land to him."

Now, every word of that clause applies to the facts of this case. Sir Kildare Borrowes, as the owner of an estate, within the meaning of the Land Purchase Acts, has sold it to the tenants thereof, and that sale has been carried through. He has demesne land in his occupation, adjacent to the estate sold; why then may not the Land Commission purchase from him such demesne? The power to do so is clearly given. There is no ambiguity in the meaning of the clause, nor has any argument been addressed to me as to its true construction by counsel for Mr. Colles.

His argument against the power of the Land Commission to buy in this case was based on two grounds—first, that under section 31 of the Act of 1896 all superior interests must be fully redeemed and satisfied out of the purchase-money; and that it is, therefore, a condition precedent to any sale under the Land Purchase Acts that the purchase-money should be sufficient for that purpose. I have already given reasons which have satisfied me that no such condition precedent exists in cases of direct sales or sales to the Land Commission under section 6; and Mr. Conner freely admitted, in reply to a question of mine, that his argument on this ground applied as much to direct sales as to sales under section 3.

The second ground of contention, as I understood it, was this, that section 3 must be construed as operative only as between the Land Commission and the vendor, and that, if the effect of the sale and re-purchase was to inflict an injustice on a third party, the power under the section could not be exercised. Well, it

appears to me that, in construing either the Land Law Acts or the Land Purchase Acts any argument based on the supposed injustice resulting from their operation can have very little weight. It is thought by some to be an injustice to reduce a landlord's rent from £150 to £100 where he has ample security for its payment by covenant or otherwise; but in cases within the Land Law Acts, if the fair rent of the holding justifies it, the Land Commission have no option but to reduce the rent accordingly. And in this very case if the tenant had not, by his own acts, after the execution of the fee-farm grant, incorporated the holding in his demesne, the probability is that during the last seventeen years Mr. Colles, instead of receiving £150 per annum out of this land, could have been receiving only £100, with the covenant for payment of £150 extinguished. That would have been, from his point of view, a much greater injustice than anything that can arise from this sale. Why then am I to suppose that the Legislature did not, in accordance with the plain meaning of section 3, intend to confer upon an owner, in respect of the land in his occupation, the same benefits that he, by the sale of his estate under the Acts, had conferred upon his tenants. I can see no reason for making any such assumption, and section 3 appears to me to show a contrary intention.

I, therefore, answer the first question in the affirmative.

The second question, as amended by me, I also answer in the affirmative.

The other three questions I answer in the negative.

J. E. W.

Mr. Colles appealed from all the answers except that to question No. 2 as amended (1).

*Appeal.*  
1911.

Feb. 15.

Conner, K.C. (with him Jefferson, K.C.), for Mr. Colles:—

Section 3 (1) of the Irish Land Act, 1903, does not apply to demesne land circumstanced as is Grangemore. That section contemplates a vendor who has some beneficial interest in the

(1) In the Court of Appeal before THE LORD CHANCELLOR, and LORDS JUSTICES HOLMES and CHERRY.

*Wylie, J.*  
1911.  
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ESTATE.



*Appeal.* land to be sold. It does not authorize the purchase by the  
 1911. Estates Commissioners of a bare liability. Under section 1 (2)  
*In re* owners of superior interests are entitled to object to the sale if the  
 BORROWES'S purchase-money is insufficient to redeem them in full. Under  
 ESTATE. section 31 of the Land Act of 1896 redemption of superior  
 interests is compulsory. In *Bolton's Estate* (1), where the value of  
 a superior interest exceeded what could be obtained upon a sale  
 to tenants under section 40 of the Act of 1896, it was held  
 by Ross, J., that an offer for sale to the tenants under that  
 section could not be made. That was followed in *Connolly's*  
*Estate* (2), and in many other cases. If the sale goes on,  
 the superior interest must be redeemed even against the will  
 of the owner. It is compulsory on the Court to do so: *Owen's*  
*Estate* (3). There Lord Justice Holmes says, at p. 173, "It  
 is no doubt a hardship that a person should be obliged by the  
 provisions of a statute to sell property which belongs to him; but  
 legislation of this kind is very common, and it is not considered  
 an injustice when means are supplied for ensuring him a proper  
 price." Fairness of price is the underlying justification of all  
 compulsory purchase. Here an important factor in the value  
 of the head rent is the collateral security for it, in the personal  
 covenant by the original grantee, who died leaving ample assets.  
 The value is not to be estimated solely by the security of the  
 land out of which it issues. When construing a statute literally  
 would work injustice, it must be construed contrary to its literal  
 meaning: *De Vesci v. O'Connell* (4); see Lord Ashbourne's  
 judgment, [1908] A. C., at p. 307.

*The Solicitor-General; A. C. Meredith, K.C., and R. Grove*  
*White, for the owner:—*

The answer in the negative to questions 3A and 3B was the  
 only answer which could have been given in accordance with the  
 provisions of the Act of 1903. Under the statute the Estates  
 Commissioners have no power to fix the redemption price of  
 superior interests, which, by section 24 (6), is a duty exclusively

(1) [1898] 1 I. R. 401.

(2) 34 Ir. L. T. R. 171.

(3) [1900] 1 I. R. 151.

(4) [1908] A. C. 298; [1908] 1 I. R.

452.

imposed on the Judicial Commissioner. Apart from the personal covenant of the vendor's predecessor in title, the value of the head rent cannot exceed the value of the land in respect of which it is payable. The additional value of the covenant will be an element in the fixing of the redemption price by the Judicial Commissioner. The fallacy pervading the whole of the appellant's case lies in the confusion of the powers and functions of the Judicial Commissioner with those of the Estates Commissioners, which the Act of 1903 is most careful to keep distinct.

*Appeal.*  
1911.

*In re*  
BORROWES'S  
ESTATE.

THE LORD CHANCELLOR:—

April 25.

This is an appeal from an order of Mr. Justice Wylie, answering as Judicial Commissioner certain questions of law submitted to him by the Estates Commissioner at the request of Mr. Morris Colles.

The facts which raise the questions and the answers are the following. Sir Kildare Borrowes, as the owner of an estate in Kildare, has, under the provisions of section 3 of the Irish Land Act, 1903, entered into agreements under the Land Purchase Acts for the sale to persons other than the Land Commission of the estate, and he is selling to the Land Commission his demesne of Giltown, with the view of repurchasing it. This demesne is in his occupation and adjacent to the estate, and the power of the Land Commission is to purchase from him the demesne at a price which, in their opinion, represents the selling value of the land.

A portion of the demesne containing some 50 acres is held by him under a fee-farm grant dated 3rd August, 1866, made by the person whom Mr. Morris Colles represents in title at the rent of £150.

It appears that Sir Kildare Borrowes made an attempt to have a fair rent fixed of this portion under the Redemption of Rent Act, but, as the lands had been incorporated in his demesne of Giltown, this application was unsuccessful, and the lands remain liable to the rent of £150, which is said, and probably truly, to be more than the value of the land, so that the security for the rent rests largely on the personal covenant of the grantee.

*Appeal.*  
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It is this fact which has suggested the objection which Mr. William Morris Colles has made to the sales, and led to the submission of the questions. The dates are—The originating application for the sale and repurchase of the demesne was made on the 25th June, 1905; Mr. Colles filed an objection on the 28th May, 1909. The Estates Commissioners disregarded it, and on the 10th August, 1909, the Estates Commissioners gave notice that, unless cause shown to the contrary within two months, the Land Commission intended to make an order vesting the demesne in the Land Commission for the purpose of resale to the vendor. Mr. Colles thereupon filed another objection, on the 9th October, setting forth substantially the same grounds of objection. The questions were then submitted.

The first question is, "Whether the Estates Commissioners have power under the provisions of section 3 of the Irish Land Act, 1903, to purchase from the vendor, for the purpose of resale to him, the lands of Grangemore, in his occupation as tenant under the lease of 3rd August, 1866?"

Mr. Justice Wylie has answered this question in the affirmative; and, as a matter of law, I cannot see what other answer could be given. I have stated what the position of the vendor is, as regards the lands and demesne; and comparing this with the provisions of section 3, every condition exists and is satisfied.

The second question is, "Whether, having regard to the fact that the said William Morris Colles objects to the proposed sale, it is the duty of the Estates Commissioners to determine the price which in their opinion represents the selling value of the said lands of Grangemore, held under the lease of 3rd August, 1866?"

Mr. Justice Wylie has answered this question in the affirmative, and there is no appeal on this point.

The third set of questions—3A, 3B, 4—depend upon the view put forward by the objector, and involve a misapprehension as to the relative duties and powers of the Estates Commissioners and Judicial Commissioner. [His Lordship read 3A, 3B, and 4, as given *ante*, p. 219.] It is said that if the demesne is sold the rent of £150 must be redeemed as a superior interest; and, the purchase-money of the lands of Grangemore not being sufficient to redeem it, Mr. Colles will be deprived of the benefit of his

covenant. This, however, does not, as a matter of law, affect the jurisdiction of the Estates Commissioners to purchase. They are not bound to purchase, and it is for them in their discretion to consider whether they will exercise their jurisdiction to do so. The redemption of superior interests and assessment of their value are exclusively under the control of the Judicial Commissioner.

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Under section 5 of the Act of 1903 the Land Commission, in a case like the present, can advance the whole or part of the purchase-money only if they are satisfied with the security, and are of opinion that, having regard to all the circumstances of the case, the agreed price is equitable.

One of the circumstances would be how far Mr. Colles would be affected by the purchase, but this is not a question of law. It is for the Estates Commissioners to consider whether the agreed price is equitable as between all the parties.

I think, therefore, that the questions 3A, 3B, and 4, are not questions of law within the meaning of section 23 of the Act. The Estates Commissioners must, it is to be assumed, before they finally determine to purchase the demesne, have regard to all the circumstances which ought to govern their discretion; but it is not the province of Mr. Justice Wylie to tell them, as a matter of law, how they ought to exercise a judicial discretion vested in them.

The appeal must be dismissed.

HOLMES, L.J. :—

This appeal has been taken from the decision of Mr. Justice Wylie on certain questions of law submitted to him by the Estates Commissioners at the request of William Morris Colles, pursuant to section 23, sub-section 1, of the Irish Land Act, 1903. The circumstances that gave rise to these questions were the proposed purchase under section 3 of that Act of the demesne of Sir Kildare Borrowes, with the view of re-selling to him the property so purchased. It is admitted that Sir Kildare Borrowes has fulfilled the conditions mentioned in that section of being the owner of an estate, and of having entered into agreements under the Land Purchase Acts for the sale to persons other than the



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Land Commission of such estate; and it is also admitted that the demesne is in his occupation, and adjacent to or in the neighbourhood of the estate. The only other material circumstance to be found in the case stated is that about fifty acres of the demesne were granted in 1866 by William Morris Colles to the predecessor in title of Sir Kildare Borrowes, in fee, subject to a fee-farm yearly rent of £150. The originating application for the sale and resale of the demesne was made on the 25th June, 1905, notice of which was served on William Morris Colles, who filed an objection to the sale on the 28th May, 1909. On the 10th August following the Estates Commissioners gave notice that, unless cause was shown to the contrary within two months from the date thereof, the Land Commission intended to make an order vesting the demesne in the Land Commission for the purpose of resale to the vendor. Thereupon William Morris Colles served another objection on the 9th October to the same effect as that of the previous May. It is not necessary for me to state or consider what is contained in these objections, as I understand that adjudication thereon stands over until the legal questions now before this Court have been decided. The first of these is whether the Estates Commissioners have power under the provisions of section 3 to purchase from the vendor for the purpose of resale to him of the part of the demesne held by him under the fee-farm grant of the 3rd August, 1866. This is a net question of jurisdiction, and I have no doubt that section 3 confers on them authority to purchase. The argument *contra*, as I understand it, is that the Commissioners can only purchase at a price representing the selling value of the land, and that the selling value of the fifty acres, out of which the fee-farm rent of £150 issues, would not be sufficient to redeem that rent, which is collaterally secured by the covenant of the grantee, who has left abundant assets to meet it. It is said that if the demesne is sold, this rent is a superior interest that must be redeemed; and that, the purchase-money of the fifty acres not being sufficient to redeem it, Mr. Colles will be deprived of the benefit of his covenant. My answer is that this does not affect the only legal question—the jurisdiction of the Commissioners to purchase. They are not bound to purchase, and it is a matter for them to consider whether, under the circumstances, it would

be just for them to exercise their jurisdiction to do so. Under section 5 the Land Commission can only, in a case of this kind, advance the whole or part of the purchase-money, if they are of opinion that, having regard to all the circumstances of the case, the agreed price is equitable. One of the circumstances of this case is how the present rights of Mr. Colles would be affected by the purchase; but this is not a question of law. It is for the Estates Commissioners to consider whether the agreed price is equitable as between all the parties interested, including Mr. Colles.

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For these reasons, I agree with the reply of Wylie, J., to question 1. Question 2 has been amended by him, and his answer has been unappealed from.

The remaining questions are not, in my opinion, questions of law within the meaning of section 23. They relate to most important considerations to which the Estates Commissioners ought to have regard before they finally determine to purchase the demesne; but it is not for Wylie, J., or for this Court to tell them how they are to exercise their judicial discretion.

CHERRY, L.J.:—

I concur. I do not see how any lawyer, familiar with the provisions of the Land Purchase Acts, could answer the questions submitted in this case in any other way than that in which Wylie, J., has answered them. The scheme of the Land Act, 1903, is to divide the procedure for carrying out sales to occupiers of land into two parts—the one part, which relates to the vesting of the land in fee-simple in the occupying tenants (or owners, in the case of demesnes), being under the control of the Estates Commissioners; and the other part, which relates to the distribution of the purchase-money, the redemption of head-rents and other superior interests, the payment of incumbrances, &c., being under the exclusive control of the Judicial Commissioner. The first twenty-three sections of the Act of 1903 regulate the jurisdiction of the Estates Commissioners. The subject-matter of this jurisdiction is the land as a concrete thing. Whenever they find a person in whom is vested “a power to sell under the Land Purchase Acts,” they may, under the 17th section, acquire *through*

*Appeal.* him, though not necessarily *from* him, all estates and interests in  
 1911. that land. They do this by a voluntary purchase from him, at a  
*In re* price agreed upon between the parties. It appears to me that  
 BORROWES'S their powers and duties are very much the same, whether they  
 ESTATE. are dealing with tenanted lands which must subsequently be  
 Cherry, L.J. vested by them in the occupying tenants, untenanted lands  
 which may be sold to other persons, or demesnes which can  
 only be re-sold to the owners of the estates sold under section 3.  
 The express words of that section, which is the one which regulates  
 the sale in the present case, enable them to purchase demesnes  
 or other land in the occupation of the owner "at a price which in  
 their opinion represents the *selling value of that land.*"

In discharging their duties under this section, I think also  
 that they are bound by the provisions of the 5th section in  
 the same way as they are in cases of sales to tenants outside the  
 provisions of section 1 of the Act, and that it is their duty to  
 see that "the agreed price is equitable." But it is the agreed  
 price of the land—not of any particular interest in it, or rent  
 secured by it—that must be found by them to be equitable.  
 If any person interested in the sale as the owner of a head-rent,  
 or incumbrance charged upon the land, desires to be heard on  
 the question of its value, I think the Estates Commissioners  
 ought to hear what he has to say. If he offers evidence of its  
 value, they ought to receive that evidence, though of course  
 it is within their own discretion to determine whether they  
 should act upon it or not. But as they have no power to redeem  
 head-rents, I cannot see what jurisdiction they have to ascertain  
 their value, except so far as doing so may assist them in coming  
 to a conclusion as to the value of the land.

The only authority cited to us which can, in the remotest  
 degree, appear to be inconsistent with this view is the decision of  
 Ross, J., in *Bolton's Estate* (1), where that learned Judge held  
 that an offer under the 40th section of the Land Act, 1896,  
 should not be made to tenants when, in his opinion, the value of  
 the superior interests, which it was necessary for the purpose to  
 redeem, exceeded the amount capable of being realized by a sale

(1) [1898] 1 I. R. 401.

to the tenants. Without expressing any opinion as to the correctness of this decision in point of law, it is only necessary to say that it has no application to the present case, inasmuch as it was decided before the passing of the Act of 1903, which limits the jurisdiction of the Estates Commissioners in the way I have mentioned.

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Mr. Conner, for the owner of the superior interest, Mr. Morris Colles, argued, on the authority of the decision of the House of Lords in *De Vesci v. O'Connell* (1), that inasmuch as a literal construction of the sections of the Land Purchase Acts in this case would lead to an injustice, a different and more reasonable construction should be put upon them in the interests of his client. But I cannot help thinking that in complaining of injustice the appellant here is under an entire misapprehension as to what is going to happen to him. He appears to think that the redemption price to be hereafter fixed for his head-rent will be limited by the amount which may be available on apportionment of the sum paid for the entire demesne between the demesne proper and the lands held under the lease of 3rd August, 1866. I cannot see that there is any foundation for this apprehension on his part. It is clearly settled that the value of the head-rent *as a rent*, with all its incidents, must be ascertained for the purpose of redemption, without taking into account the amount available from any particular source for carrying out the redemption; and that, in fixing the redemption price, regard must be had not only to the value of the land out of which the rent issues, but also to the personal covenant by which it is secured. This has been expressly decided by the present Master of the Rolls when Judicial Commissioner in *Stronge's Estate* (2), and by Bewley, J., in *Chearnley v. O'Donnell* (3), a case under the Redemption of Rent Act, 1891, where, of course, the same principles apply as in the redemption of superior interests. What is to happen in the unfortunate event of the funds proving to be insufficient I am not now prepared to say, but I agree with what was laid down by Holmes, L.J., in *Owen's Estate* (No. 3) (4), that in that event

(1) [1908] A. C. 298.

(3) 32 L. R. Ir. 185.

(2) [1906] 1 I. R. 550.

(4) [1900] 1 I. R., at p. 176.



*Appeal.* "there can be neither redemption nor satisfaction" of the superior  
 1911. interest. I do not see how the owner of the head-rent can be  
*In re* deprived of his remedy upon the covenant in the lease unless he  
 BORROWES'S is paid the full amount of the redemption-price fixed by the  
 ESTATE. Judicial Commissioner, in accordance with the principles of  
 Cherry, L.J. justice laid down in many cases in this Court (1).

Solicitor for Mr. Colles: *C. H. Monsarrat.*

Solicitors for the vendor: *White & White.*

W. G.

*M. R.*

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Feb. 15, 16.

## CUMMINGS v. STEWART.

*Patent—Licence—Royalties—Transfer—"Two-member" Company.*

A clause in a licence agreement for the use of certain patents provided that "the said licensee may . . . transfer the said licence to any limited liability company he may form to carry on his business, or the business connected with and arising out of said patents and this licence."

*Held*, that the licensee could not under this clause rid himself of liability for royalties due under the licence agreement, by transferring the licence to a company formed, not for the purpose of carrying on his business, or of working the patents, but merely with a view to ridding him of such liability.

### TRIAL OF ACTION.

The plaintiff, who was the inventor of a novel system of reinforced concrete construction, and the owner of patents covering his invention, entered into a licence agreement with the defendants for the use of his patents. The licence agreement, dated 3rd April, 1907, recited that the licensor was an expert engineer in reinforced concrete construction, and the inventor and owner of improvements in metal for reinforced concrete construction, known as the Cummings system and protected by European letters patent; and that the licensee was desirous of using the improvements, devices, appliances, and processes covered by said letters patent and applications aforesaid in and for the construction of reinforced concrete structures, with the intent of introducing,

(1) On May 16th, 1911, *Meredith, K. C.*, for the vendor, and *Jefferson, K. C.*, for Mr. Colles, were heard by the Estates Commissioners on the question of price. Judgment was reserved by the Commissioners.

exploiting, and using the Cummings system of reinforced concrete construction within the United Kingdom of Great Britain and Ireland, and France, and Austria, and other European countries.

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By the first paragraph of the licence agreement, the licensor granted to the licensee the right, licence, and privilege of using the patents in the above-mentioned countries, said right, licence, and privilege to continue for the full term of the several patents, unless revoked as therein provided for.

By the second paragraph, the said licensee agreed to pay to the said licensor a royalty of  $2\frac{1}{2}$  per cent. on the total or gross amount included in every contract for work actually executed on the Cummings system, including additional sums for extra work (as therein), the royalty so to be paid by said licensee to said licensor not to be less than five thousand dollars in any one year during the continuance of this licence agreement, except that during the first three years the amount must not aggregate less than five thousand dollars, of which one thousand dollars must be paid within the first year, and one thousand five hundred dollars within the second year, and two thousand five hundred dollars within the third year.

Paragraph three was as follows:—"The said licensee agrees to put forth his best efforts to complete the structures contracted for within the time contracted for; and, where no time is specified, then as rapidly as possible; and agrees to carry out every such contract in strict accordance with the working plans and specification in the best manner, and with the best material and by skilled workmen, and will do all in his power to so carry out the contracts as to prevent injury to the reputation of the Cummings system of reinforced concrete construction, and to maintain the present high reputation of the said system, and also agrees to give the said licensor or his agents access at all times to the work under construction."

Paragraph five was as follows:—"The said licensee agrees not to sublet, assign, or transfer the rights and privileges conferred upon him by this licence agreement without first securing the written consent of the said licensor. Any assignment shall be considered a cancellation of all the rights of the licensee. *Provided that notwithstanding this clause the said licensee may, without any*

*M. R.*    *such consent as aforesaid, transfer the said licence to any Limited*  
 1911.    *Liability Company he may form to carry on his business or the*  
*CUMMINGS*    *business connected with and arising out of said patents and*  
 2.    *this licence."*  
*STEWART.*

The speculation having proved an unprofitable one for the defendant, he was desirous of ridding himself of liability under the licence agreement, and proceeded to form a company, and to transfer to them the patent rights, not for the purpose of working the patents, but with a view to ridding himself of further liability under the licence agreement. The defendant believed he was entitled to adopt this course under the provisions of paragraph 5 of the licence agreement above set forth.

The memorandum and Articles of Association, and return, made by the company, as formed, were as follows:—

"Concrete Constructions, Limited, incorporated 21st July, 1909, No. 3455.

"Registered office, 9 and 11 Elgin Street, Belfast. Thomas L. Moore, Acting Director. Company limited by shares.

#### " OBJECTS.

"1. To acquire and take over interest of William J. Stewart, of Ormeau Road, Belfast, engineer and contractor, in invention for improvements in connexion with reinforced concrete constructions, under an agreement, dated 3rd April, 1907, made between Robert A. Cummings of the one part, and William J. Stewart of the other part.

"2. To use and develop inventions.

"3. To carry on business of builders and contractors for purposes of inventions.

"4. To undertake contracts.

"5. Carry on any other business capable of being carried on in connexion with above objects or which would enhance the value of the company's property.

"6. To acquire, by purchase or otherwise, inventions, licences, &c.

"7. To acquire by lease or purchase property, and rights or privileges.

"8. Receive money on deposit receipt at interest or otherwise, and to invest surplus moneys of Company.

"9. To lend money and guarantee performance of contracts. M. R.

"10. To raise or borrow, or secure payment of money as the 1911.  
Company think fit by issue of debentures or debenture stock. CUMMINGS

"11. To sell, maintain, and grant licences in respect of property v.  
and rights of the Company. STEWART.

"12. To purchase shares or debentures of any other Company.

"13. To draw, accept, indorse Bills of Exchange, Promissory  
Notes, &c.

"14. To do all above things in any part of the world, and  
to establish agencies.

"Liability of Members, total capital £1000, divided into  
1000 shares of £1 each.

"Subscribers.

"H. Kruse of 3 Ravenhill Gardens, Belfast, Civil Engineer,  
one share.

"Thomas L. Moore, of 1 Cromwell Road, Belfast, Builder's  
Manager, one share.

"Total shares taken, two.

"Directors, same as above.

"The above signatories were appointed Directors, under the  
Articles of Association, to act until Directors were appointed.

"No other subscribers."

The plaintiff now sought to make the defendant liable for  
royalties under the licence agreement, notwithstanding such  
transfer. The defendant put in a counterclaim containing certain  
allegations, which were withdrawn at the hearing.

*S. L. Brown, K.C., D. M. Wilson, K.C., and Best, for the  
plaintiff:—*

The plaintiff is clearly entitled to his royalties under the  
agreement. The defendant cannot escape from his liability by  
a pretended transfer of his rights to a company consisting of  
two persons. The company is not one framed to carry on  
either the defendant's business or the business arising out of  
the patents and the licence within the meaning of clause 5. The  
defendant is seeking to avoid liability by a trick.



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*Herbert Wilson, K.C., and Hanna, for the defendant :—*

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The defendant is entitled to transfer his rights and liabilities to a company under clause 5 of the agreement, and has done so in the present case. The fact that his object was to escape from his liability under the agreement does not affect the matter. It is exactly the same case as an assignment to a pauper under a lease. The validity of such an assignment has been recognized by the highest tribunals: *Philpot v. Hoare* (1); *Hopkinson v. Lovering* (2); *Ex parte Good*; *In re Salkeld* (3).

Feb. 16.

THE MASTER OF THE ROLLS :—

In my opinion, the Companies (Consolidation) Act, 1908, embodies a code framed (*inter alia*) for the purpose of preserving and enforcing commercial morality, and it would be strange, indeed, if that code could be turned into an engine for the destruction of legal obligations, and the overthrow of legitimate and enforceable claims. The most casual reader of the speeches of the Law Lords in the case of *Salomon v. Salomon & Co.* (4) cannot fail to observe that there is nothing in any of those speeches contrary to the view I have just expressed.

In the present case all the ability and all the legal acumen and learning of Mr. Herbert Wilson have failed to give any semblance of justification or reality to the trick by which the defendant endeavoured to evade his legal obligations. Allegations and suggestions of fraud, misrepresentation, concealment of fact, misdescription, have all vanished from this case; yesterday afternoon Mr. Herbert Wilson withdrew, on the instructions of his client, such allegations or suggestions. The case (as it now stands) is a case in which the plaintiff, who is a gentleman resident in America, has developed and patented a particular form of what may be called a new system of "reinforced concrete." The defendant is a gentleman who had and has an interest, a great interest, in any such system, provided it could be put into practical operation and effect. Accordingly, he managed to secure the sole and exclusive right of utilizing the patent rights of the American

1) 2 Atk. 219.

(2) 11 Q. B. D. 92, at p. 97.

(3) 13 Q. B. D. 731.

(4) [1897] App. Cas. 22.

inventor in the United Kingdom, in France, and in Austria, on terms which he doubtless considered, and which now must be held by this Court to have been accepted by him, as fair and reasonable terms. All questions of fraud, undue pressure, misrepresentation, &c., being withdrawn, the sole question I have to decide is whether, under the 5th clause of the contract between the plaintiff and defendant, the plaintiff left open to the defendant a loophole of escape from his liability, in the event of the contract turning out one of an unfortunate kind for the defendant. There is no reason to think that the defendant did not do his best. It is obvious that many persons—whether corporations or individuals—might fairly say to a contractor—“Your Cummings system of reinforced concrete may be the best thing in the world, but, nevertheless, it has not stood, for it has had no opportunity of standing, the test of time.” Time is the great arbiter, and time alone will tell whether the Cummings system of reinforced concrete will stand the test. But Mr. Stewart must have known, and must be held to have faced the risks incident to the development of a novel invention. In my judgment the proviso at the end of clause 5 of the contract can only be construed in one way, that is to say, that the company to which the defendant, without the consent of the plaintiff, might transfer his obligations and his rights, was a company formed to carry on his business, or the business “connected with and arising out of said patents and this licence.” Mr. Wilson said the fifth clause was inserted for the purpose of mitigating in some sense the onerous liability of the defendant. I do not think it was. If I were to give an opinion on the subject, I should say that the proviso was inserted for the purpose of enabling the defendant to form a company for the purpose of exploiting the invention. Let me read the clause. [His Lordship read the clause.] The defendant says he has formed a company within the meaning of that clause, and that the intention with which the company was formed, and with which the two holders of £1 shares come into this concern, is not for me, and that I have no right, to comment on it. I have no right at all, except for the fact that it is demonstration that the company was formed not to carry on the business of the plaintiff—not, in the words of the proviso, to carry on the business “connected with and arising out

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of said patents and this licence," but for the purpose of extinguishing the patent rights, or, at all events—and this is sufficient to justify the plaintiff in persisting in his claim in this case—for the purpose of refraining from carrying on any work connected with the reinforced concrete patents of the plaintiff. The correspondence speaks for itself, and the affidavit of the defendant speaks for itself, and for the defendant. Let me read a passage from his affidavit used on the hearing of the motion for security for costs, which is relied on by Mr. Brown as the mainstay of his case:—"When I could get no reply from the plaintiff to my letter of 21st August, 1908, I had enquiries made, and ascertained then that the representations which had been made to me were wholly false"—let me recall the fact that this charge has been wholly withdrawn—"and I never acted under the agreement after that date; and as I could get no reply from the plaintiff, I came to the conclusion that there was design in his silence, and I then took steps to clear myself of the possibility of further liability under the agreement. Mr. Crawford knows that the transfer to the company was for the purpose of ridding me of the possibility of further liability, and not with any idea of working on the agreement. The patents are wholly useless." If the company formed under such circumstances be a limited liability company, to which the defendant under clause 5 of the agreement was entitled to transfer his rights, then I do not understand the meaning of the English language, or the power of this Court to enforce a contract.

The judgment of the Court was as follows:—

"This Court doth declare that the plaintiff is entitled to payment of the minimum royalties due under clause 2 of the agreement dated the 3rd of April, 1907, as in paragraph 2 thereof, up to the 4th day of January, 1910, being the date of the issue of the writ of summons in this action, and this Court doth order that the defendant's counterclaim be and the same is hereby dismissed with costs to be paid by said defendant to the said plaintiff when taxed and ascertained, and this Court doth order that the said defendant do pay to the plaintiff his costs of this action when taxed and ascertained."

Solicitors for the plaintiff: *Crawford & Lockhart.*

Solicitors for the defendant: *Carson & M'Dowell.*

IN THE MATTER OF THE ESTATE OF NICHOLAS P.  
O'GORMAN.

Wylie, J.  
1911.

May 4, 9.

*Land Purchase Acts—Irish Land Act, 1909 (9 Edw. 7, c. 42)—Bonus Schedule—Judicial rent fixed or agreed to since the passing of the Act of 1896—Bona fide transaction—Purchase agreement entered into between the date of lodgment of fair rent agreement and date of filing thereof.*

In order to entitle a vendor, selling under the Land Purchase Acts, to a bonus calculated under the first column of the Bonus Schedule to the Irish Land Act, 1909, the agreement fixing the judicial rent of the holding for a second term must be a real and *bona fide* transaction intended to be acted upon if the sale should fall through, and not one entered into for the sole and indirect object of increasing the amount of the bonus.

The fact that the purchase agreement is entered into between the date of the lodgment of the fair rent agreement with the Land Commission, and the date of the filing thereof, does not *per se* prevent the latter from being treated as a judicial rent, fixed or agreed to since the passing of the Act of 1896, for the purposes of the Bonus Schedule.

*Quære*, where a second-term judicial rent is *bona fide* fixed, does the fact that it is of the same amount as the first-term rent prevent the case from coming under the first column of the Bonus Schedule, in the event of the sale of the holding being carried out under the Land Purchase Acts?

OBJECTION by the vendor to the draft bonus certificate.

The facts upon which the objection was based, and the grounds of the objection, appear sufficiently from the judgment.

*Mr. Meldon*, solicitor, appeared for the vendor.

WYLIE, J.:—

May 9.

This case comes before me, upon an objection by the vendor to the draft bonus certificate.

The facts are these. Three tenants—Anne Browne, Denis Considine, and Mary Browne—prior to November, 1910, held their respective holdings subject to judicial rents fixed or agreed to about the year 1890. On the 25th November, 1910, Anne Browne and her landlord signed an agreement in the prescribed form, fixing a fair rent for a second term at the



*Wylie, J.* same figure—£10 19s.—as the first-term rent. That agreement was  
 1911. lodged with the Land Commission on the 23rd December, 1910,  
*In re* and on the next day, the 24th December, 1910, she and the land-  
 O'GORMAN'S lord signed an agreement for purchase at £187, being seventeen  
 ESTATE. years' purchase of the rent. On the 7th January, 1911, the other  
 two tenants also signed fair-rent agreements for the second term at  
 their former rents, which were lodged on the 10th January, 1911,  
 and they signed purchase agreements with their landlord on  
 the 11th January, at sums amounting to 17½ and 16½ years'  
 purchase of their rents respectively. Three months after these  
 agreements fixing second-term rents were lodged, viz., on the  
 23rd March, 1911, and on the 11th April, 1911, they were filed  
 by the Land Commission, and, if these agreements were real  
 and *bona fide*, the rents fixed thereby thereupon became judicial  
 rents fixed or agreed to at the dates of the respective agreements,  
 and, therefore, prior to the dates of the purchase agreements.  
 The sales having been sanctioned, and the agreed purchase-  
 money having been advanced, the draft certificate calculated  
 the amount of the bonus in each case upon the basis of the  
 second column of the first Schedule to the Act of 1909, treating  
 the rents as judicial rents fixed or agreed to prior to 1896, which,  
 as regards amount, they no doubt were, and, if they ought to be  
 so treated, the draft certificate is admittedly correct. But the  
 vendor contends that the moment the same rents were agreed to  
 and filed as second-term rents they ceased to be judicial rents  
 fixed or agreed to prior to 1896, and must be treated as judicial  
 rents fixed or agreed to since 1896, and, therefore, within the  
 first column of the Bonus Schedule; and that the vendor, instead  
 of getting a bonus in the respective cases of 14, 14, and 16 per  
 cent., as in draft certificate, would be entitled to 18 per cent. in  
 each case.

Now this question came before me in a similar case on the  
 same estate (1), but it does not appear in the report, and I feel  
 sure the fact was not brought to my notice, that the same rent  
 had been agreed upon as a second-term rent, the only question  
 raised and decided by me being this, whether the fact that the

purchase agreement was entered into between the date of the lodgment of the fair-rent agreement with the Land Commission and the date of the filing thereof, prevented the second-term rent from being treated as a judicial rent fixed or agreed to since the passing of the Act of 1896, for the purposes of the purchase agreement. I held that it did not, and I am still of that opinion, such opinion being, I think, in accordance with the decision of the Court of Appeal in *In re Talbot Crosbie's Estate* (1); and if these agreements for second-term rents were real and *bona fide* transactions intended by the parties to be effective as second-term rents if these sales fell through, I would, in my opinion, be bound to hold that the cases come under the first column of the Bonus Schedule, and the vendor would be entitled to a bonus of 18 per cent. in each case.

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But the solicitor for the vendor very frankly admitted that the idea of fixing a rent that might continue for a second term never entered the minds of the parties; that the sole object of the transaction was to increase the bonus by bringing the case within the first instead of the second column of the Bonus Schedule. Now these two columns are based on the assumption that a rent fixed after 1896 is considerably lower than a rent fixed prior to that year, it being well known that second-term rents are on the average over 19 per cent. less than first-term rents; and it is on that assumption that different percentages of bonus are given for the same number of years' purchase of rents fixed before or after the 15th August, 1896. It is rather startling, therefore, to be told that, where the rent remains the same, and the purchase-money the same, the amount of bonus can be increased by going through the form of signing a sham agreement whereby the same thing may be called by a different name.

It is said, on behalf of the vendor, that the object of the Bonus Schedule was to encourage a vendor to sell to his tenants at a smaller number of years' purchase than he would otherwise have done, and that the vendor in this case, for instance, would not have sold to Anne Browne at seventeen years' purchase of her first-term rent if she had not agreed to make it in name a second-

(1) [1905] 1 I. R. 570.

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term rent. But, notwithstanding the new name, she is still paying seventeen years' purchase of her judicial rent fixed or agreed to prior to the Act of 1896, which, in accordance with the heading of the second column of the Bonus Schedule, entitles the vendor to a bonus of only 14 per cent.

Suppose a tenant, holding at a judicial rent of £30, fixed prior to the Act of 1896, offers in 1911 to purchase the fee-simple at twenty-four years' purchase of the rent, viz. £720, if the landlord accepted that offer he would get no bonus under the second column of Schedule, and knowing that, he informs the tenant that he will agree to sell at the price offered, if the tenant will sign an agreement fixing a second-term rent at £36 a year, thus making the £720 purchase-money only twenty years' purchase of a second-term rent, so that the landlord will be entitled to a bonus under the first column of the Schedule of 12 per cent. That is, without altering the terms of purchase, or giving the tenant any benefit, the vendor, by getting the tenant to go through the form of fixing a sham second-term rent, secures for himself out of the Land Purchase Aid Fund the sum of £86 8s. Surely such a case requires only to be stated to be scouted out of Court. Wherein does it differ from the present cases except in degree? They are both, to my mind, transparent shams, and if allowed, would be in effect, though not in intention, a fraud upon the Act of Parliament.

I do not say that, where a second-term rent is *bona fide* fixed as a rent to be binding between the parties if the sale should fall through, the fact that it is of the same amount as the first-term rent would, if the sale is carried out, prevent the case from coming under the first column of the Bonus Schedule. I reserve my opinion on that point. But, in my opinion, on the admission of the vendor's solicitor, the agreements in these cases fixing second-term rents were not real or *bona fide* transactions, but were entered into for a wholly different and indirect object, and were such as no Court should act upon or give effect to, and I, therefore, disallow the objection to the bonus certificate.

SHILLINGTON v. PORTADOWN URBAN DISTRICT COUNCIL. *Barton, J.*  
1910.

May 11, 12,  
13.  
June 29.

*Will—Construction—Charitable gift—"Purposes of healthy recreation"—  
Gift for public purposes for benefit of a particular town—Purpose bene-  
ficial to community—Overriding charitable purpose—Perpetuity—Inclusion  
of objects not charitable—Urban Council—Trusteeship.*

A testator devised and bequeathed all his real and personal property to A. and B. (whom he appointed executors of his will) and the Portadown Urban Council for the time being, in trust, to retain his property in its then form, and out of the income to keep his house property in good order and repair, and secondly to accumulate £100 per annum during the joint lives of A. and B., and for twenty years after the survivor's death, for the purpose of forming a fund for the redemption of head rents on the trust property; or to be invested in trustee securities, which sum when it fell into the hands of the trustees of his will to be added to the capital sum then in hands, but, at the discretion of the trustees, at the end of every five years to apply the accumulations to augment the capital fund, and in the third place, testator directed that £5 per annum should be retained by the trustees for the purpose of a quinquennial dinner to "my trustees and the clerk of the Urban District Council for the time being," and such others as the trustees should decide to invite, and testator directed that his will should be read and discussed at these dinners. Testator then directed that the balance of the income derived from his estate should be applied by his trustees "for the purpose of fostering, encouraging, and providing the means of healthy recreation, including the teaching of singing in classes or choruses, for the residents of the town of Portadown and the surrounding districts, and for the purpose of providing music and instruments (in so far as my trustees think advisable) for the town band, in such a manner and form as my trustees in their absolute discretion consider best, but in no case shall my trustees pay away any moneys derived out of my estate for prizes for football or rowing for speed."

*Held*, that the direction to the trustees as to the application of the balance or residue of the income of the trust estate constituted a valid charitable devise and bequest, being for a charitable and public purpose.

*Held*, also, that the directions as to accumulation and as to the quinquennial dinners, were subordinate and ancillary to the main general charitable purpose, and if any of the directions as to any of them failed, the income applicable thereto would fall into the residue and be available for the main charitable object.

*Held*, also, that the direction as to the town band was not a gift for the benefit of the band, but was a particular way of carrying out a general public and charitable purpose for the benefit of the town and neighbourhood.



*Barton, J.*      *Held*, also, that the Urban Council could not hold lands as devisees in trust  
 1910.      in the manner contemplated by the will, and that the Court would effectuate  
*SHILLINGTON*      testator's intentions by settlement of a scheme which would provide if  
*v.*      necessary for the appointment of trustees, and would have regard to the fitness  
*PORTADOWN*      of the Council to assist in carrying out a trust for the benefit of the town and  
*U. D. C.*      neighbourhood.

William John Watson, who died on 27th October, 1907, by his will, dated July 4th, 1906, appointed David Graham Shillington and James Patterson Best, his executors, and proceeded as follows:—"I appoint David Graham Shillington and James Patterson Best, together with the members of the Portadown Urban Council, for the time being, the trustees of this my will; and I give, devise, and bequeath all I may die possessed of, whether real or personal property, unto the said David Graham Shillington and James Patterson Best, hereinafter called 'my trustees,' upon the trusts hereinafter contained; and I hereby empower 'my trustees' to retain my property in its present form, and out of the income derived out of the property in its present form I direct 'my trustees' in the first place to keep my house-property, in good order and repair; and, in the second place, I direct that a sum of one hundred pounds per annum shall be set aside from the date of my death, to accumulate during the joint lives of the said David Graham Shillington and James Patterson Best, and during the life of the survivor of them, and for a period of twenty years after the death of the survivor of them, for the purpose of forming a fund which with the accumulations thereon is to be either used for the purpose of buying out the head rents upon the property devised and bequeathed by me, or to be invested in trustee securities, and which sum when it falls into the hands of 'my trustees' is to be added to the capital sum, then in hands; but 'my trustees' may, if they think right, at the end of five years from the date of my death, and at the end of every succeeding period of five years, apply the accumulations to augment the capital fund; and, in the third place, I direct that a sum of five pounds annually be retained by my trustees, and at the expiration of five years from the date of my death, or, if 'my trustees' prefer it, during the succeeding winter months, I direct that 'my trustees' shall apply the sum of twenty-five pounds, being

the accumulations at five pounds a year, for five years as above mentioned, in providing a dinner for 'my trustees,' the clerk of the Urban District for the time being, and such others as 'my trustees' shall decide to invite, not exceeding in all the number of twenty-five, and I direct that similar dinners be given at the expense of my estate as aforesaid on every fifth year following the date on which the first dinner is provided; and I direct 'my trustees' to have this my will read at every dinner, in order that it may be discussed; and perhaps by this means 'my trustees' may get some valuable suggestions as to carrying out the trusts herein mentioned; and in the fourth place, I direct that the balance of the income derived from my estate shall be applied by 'my trustees' for the purpose of fostering, encouraging, and providing the means of obtaining healthy recreation, including the teaching of singing in classes or choruses, for the residents of the town of Portadown and the surrounding districts, and for the purpose of providing music and instruments (in so far as 'my trustees' think advisable) for the town band, in such manner and form as 'my trustees' shall in their absolute discretion consider best; but in no case shall 'my trustees' pay away any moneys derived out of my estate for prizes for football, or for rowing for speed. I hereby direct that my executors shall be an advisory committee to the Urban Councillors for the time being."

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At his death testator was possessed of net personal estate sworn for purposes of probate at £7,457 17s. 3d., and was seised of net real estate about the value of £2,716 17s. 11d.

On the 27th of February, 1909, probate of testator's will was granted to the plaintiffs, who brought an action claiming that the trusts of the will might be carried into execution, and that the real and personal estate of the testator might be administered under the direction of the Court.

*Bates, K.C.* (with him *Richard Best*), for the plaintiffs.

The bequest of the residue is valid. It is a good charitable gift, apart from its limitation to a certain locality. The motive of the gift is charitable, and that determines its charitable character. There is no vagueness, for the testator himself

*Barton, J.* has defined the object to be "healthy recreation." *Weir v. Crum-Brown* (1). The limitation to a particular locality clearly renders it a good gift: see *In re Allen, Hargreaves v. Taylor* (2), and cases cited therein. As to the trust for a dinner every fifth year, this is a good bequest, being incidental to the execution of the main charitable gift. It is also valid on the authority of *In re Charlesworth, deceased, Robinson v. Cleveland* (3). The town band can be properly included in a good charitable gift, and in any event the gift is rendered valid by the over-riding charitable motive: *Hunter v. Attorney-General* (4); *Sinnett v. Herbert* (5); *In re Douglas, Obert v. Barrow* (6). In the event of the Court holding the trust for dinners or that in favour of the town band invalid, the residuary clause captures for the main charitable object the amount of the dispositions that have failed. The failure of one or more of the objects would be only matter for apportionment: *Rigley's Trusts* (7); *Hoare v. Osborne* (8); *Vaughan v. Thomas* (9).

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*Arthur W. Samuels, K.C., Frederick Fleming, K.C., and F. Denning*, for the defendant, *Elizabeth Watson*, one of the next-of-kin of testator.

There is no general residuary gift in the will. If any of the first three objects fail, that portion of the income is undisposed of; it does not fall into the fourth category.

The direction to accumulate £100 per annum is bad (a). It offends against the Accumulation Act, 1892, 55 & 56 Vict. c. 58, section 1. "Land" includes head rents: *In re Clutterbuck, Fellowes v. Fellowes* (10); *In re Baroness Llanover, Herbert v. Freshfield* (11); (b) it offends against the rule against perpetuities. There is no *cestui que trust* who is entitled to the accumulated fund within the legal period. The head rents might not come into the market within the period. The direction to accumulate being bad, the £100 per annum is undisposed of: *Smith v.*

(1) [1908] A. C. 162.

(2) [1905] 2 Ch. 400.

(3) [1910 W. N. 18.

(4) [1899] A. C. 309.

(5) L. R. 7 Ch. App. 232.

(6) 35 Ch. D. 472.

(7) 36 L. J. Ch. 147.

(8) L. R. 1 Eq. 585.

(9) 33 Ch. D. 187.

(10) [1901] 2 Ch. 285.

(11) [1903] 2 Ch. 330.

*Cuninghame* (1) ; *Cochrane v. Cochrane* (2) ; *Chamberlayne v. Barton, J. Brockett* (3) ; *In re Swain, Monckton v. Hands* (4). The gift for dinners is bad : *In re Barnett, Waring v. Painter Stainers Co.* (5). *In re Charlesworth, Robinson v. Cleveland* (6) is distinguishable. It was for the purpose of a religious society and to further its objects.

There is no overriding charitable trust in the will. The fourth classification is distinctly applicable to two objects ; the fact that the Urban Council is a trustee (if it is a trustee) for the purposes of the will, and that such a body is a trustee of municipal property for charitable purposes, does not thereby imply that a gift to them is in itself charitable. The question is not what a trustee is, but what are the *cestuis que trustent* : *In re Freeman, Shilton v. Freeman* (7) ; *In re Davidson, Minty v. Bourne* (8). A corporation may take property in trust for purposes altogether private : *Corporation of Gloucester v. Osborn* (9). Purposes of healthy recreation, though of public utility, are not charitable. See Halsbury's Laws of England "Charity," p. 123 : *Morice v. Bishop of Durham* (10) ; *Re Nottage, Jones v. Palmer* (11) ; *Re MacDuff* (12). It required an Act of Parliament to legalize a gift for recreation ground, and then only a limited amount could be so devoted : 22 Vict. c. 27, Local Government Act, 1909. The Public Health Acts Amendment Act, 1907, sect. 76, which enables a public authority to contribute to bands, &c., and to play in a public park, did not come into operation until the 1st January, 1908. Nor has it yet been applied to Portadown under section 3. The gift for the town band is bad. It is a private association sustained by subscriptions of members and others : *Thomson v. Shakespear* (13) ; *Carne v. Long* (14) ; *Re Swain, Phillips v. Poole* (15) ; *In re Allsopp, deceased, Gell v. Carver* (16) ; *Re*

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(1) 13 L. R. I. 480.

(2) 11 L. R. I. 361.

(3) L. R. 8 Ch. App. 206.

(4) [1905] 1 Ch. 669.

(5) 24 T. L. R. 788.

(6) [1910] W. N. 18.

(7) [1908] 1 Ch. 720.

(8) [1909] 1 Ch. 567.

(9) 1 H. L. Cas. 272, 285.

(10) 10 Ves. 522.

(11) [1895] 2 Ch. 649.

(12) [1896] 2 Ch. 451.

(13) 1 De G. F. &amp; J. 399.

(14) 2 De G. F. &amp; J. 75.

(15) 99 L. T. (N. S.) 604.

(16) 1 T. L. R. 4.



*Barton, J. Dutton* (1). The objects of public utility must come within the 1910. statute of Elizabeth or Charles (Ireland) to be valid charitable objects: *Blair v. Duncan* (2); *Langham v. Peterson* (3).

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The institute in *Hardy v. Attorney-General* (4) was a public hall: and in *Jarvis v. Corporation of Birmingham* (5) the gift was for charitable and benevolent institutions in Birmingham and the Midland Counties, and was decided by Farwell, J., to be controlled by the word "charitable." *Mitford v. Reynolds* (6) is to the same effect: *Hargreaves v. Taylor* (7). As the gift can be applied at the discretion of the trustees to non-charitable purposes it fails altogether: *Morice v. Bishop of Durham* (8); *Hunter v. Attorney-General* (9). Even if the gift for recreation purposes were held good, then the fund must be divided into moieties, the gift for the band being bad: *Attorney-General v. Doyley* (10); *Salisbury v. Denton* (11); *Hall's Charity* (12); *Crafton v. Frith* (13); *Hoare v. Osborne* (14).

*Calvert*, for W. H. Wright (representing the individual members of the council) :—

Under the wording of the will, the individual members of the council from time to time are the trustees; alternatively the individual members of the council at the date of the death, as long as they continue members of the council, are the trustees. They cease to be trustees when they cease to be members of the council. An urban council in its corporate capacity cannot be a trustee. They can only hold land for the purpose of their powers and duties: Local Government Act, 1898 (61 & 62 Vict. c. 37), sects. 10, 27 (4), 36. The objects are charitable.

[He also referred to *Ellison v. Thomas* (15); *Goods of Thompson* (16); *Delany's Estate* (17); *Moss v. Dunlop* (18).]

(1) 4 Ex. Div. 54.

(2) [1902] A. C. 37.

(3) 87 L. T. (N. S.) 744.

(4) [1905] 1 Ch. 232.

(5) [1904] 2 Ch. 354.

(6) 1 Phillips, 185.

(7) [1905] 2 Ch. 400.

(8) 10 Ves. 522.

(9) [1899] A. C. 309.

(10) 4 Vin. Abr. 485, pl. 16.

(11) 3 K. & J. 529.

(12) 14 Beav. 115.

(13) 4 De G. & S. 237.

(14) L. R. 1 Eq. 585.

(15) 1 De G. J. & S. 18.

(16) 16 Jurist, 342.

(17) 9 L. R. I. 228.

(18) Johnson, 490.

*William Moore, K.C.* (with him *A. K. Overend*), for the *Barton, J.*  
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Urban councils have power under the Local Government Act, 1898, sects. 10 and 36, to acquire and hold lands for certain defined public purposes, including recreation grounds and public walks, and they can be held by them in joint tenancy : see *Bodies Corporate (Joint Tenancy) Act, 1899*. Under the *Public Health Acts Amendment Act, 1907*, they can contribute from the public rates for, *inter alia*, purposes of healthy recreation. A town band is an object of a public kind, and for the benefit of the community. A gift to the council in their corporate capacity is valid. It must be in their corporate capacity, as if it were to individuals there would be no succession : *Hogan v. Byrne* (1) ; *Delany's Estate* (2) ; *In re Caldbeck's Trusts* (3). A bequest in aid of rates is a valid charitable gift : *Tudor on Charities* (1906), pp. 50 and 169. The provision for trustees' dinners perfects the machinery of the trust. It brings together persons interested in it, and tends to increase their usefulness in promoting its objects : *In re Charlesworth, Robinson v. Archdeacon of Cleveland* (4).

On the general construction of the will there is a valid charitable bequest. The statute of 10 Car. 1, Sess 3, c. 1, is wider in its terms than the corresponding English statute of Elizabeth. Education, the liberal arts and sciences, are included in the Irish statute. This covers the gift here for musical purposes. Is the gift for the general benefit of the community? That is the test : *Income Tax Commissioners v. Pemsel* (5) ; *In re Allsopp's Estate, Gell v. Carver* (6) ; *Re Swain, Phillips v. Poole* (7) ; *In re Nottage, Jones v. Palmer* (8) ; *In re Stephens, Giles v. Stephens* (9) ; *Webb v. Oldfield* (10). Where a general charitable public bequest is too indefinite it has been held void in many cases, but where it can be applied to a particular locality it has been held to be a valid gift : *Goodman v. Mayor of Saltash* (11) ;

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(1) 13 Ir. C. L. R. 166.

(2) 9 L. R. 1. 226.

(3) 8 I. L. T. R. 119.

(4) [1910] W. N. 18.

(5) [1891] A. C. 531.

(6) 1 T. L. R. 4.

(7) 99 L. T. 604.

(8) [1895] 2 Ch. 649.

(9) 8 T. L. R. 792.

(10) [1895] 1 I. R. 431.

(11) 7 A. C. 633, 642.

*Barton, J. Corporation of Wrexham v. Tamplin* (1); *In re Mann, Hardy v. 1910. Attorney-General* (2); *In re Best, Jarvis v. Corporation of Birmingham* (3); *In re Allen, Hargreaves v. Taylor* (4).

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*Frederick Redmond*, for the heir-at law :—

In respect of the fourth trust named in the will, if consistently with the terms of the will the money can be applied to non-charitable purposes, the trust fails : *James v. Allen* (5); *Morice v. Bishop of Durham* (6). It is competent for the trustees in this case to apply the funds to purposes of mere amusement, such as prizes for sports, which are non-charitable. "Healthy recreation" is a vague expression, understood differently by different persons, and it would be impossible for the Court to say that almost any application of the money by the trustees would be invalid, or to restrain them from maladministration. No trust is good which a Court cannot enforce or restrain the trustees from wrongly administering the trust property. In every case where a trust, otherwise bad on account of vagueness, has been held good because confined to a particular area, the area has been a definite geographical unit such as "town," "parish," "townland." Here the "surrounding districts" are included with the town of Portadown, and that expression is impossible to define, and will vary with means of locomotion. Suppose the trustees decided to offer a prize for a flat race, or a hurdle race at annual sports, should the entries be confined to inhabitants of Portadown, or to those resident within a mile or two miles? Where draw the limit? In every decided case there is a general public purpose which is confined to a particular area.

*T. H. Maxwell*, for the Commissioners of Charitable Donations and Bequests :—

It is a condition precedent to a valid charitable bequest that there should be a sufficiently precise direction to enable it to be carried into effect, and that it must be for a general public use;

(1) 28 L. T. (N. S.) 761.

(2) [1903] 1 Ch. 232.

(3) [1904] 2 Ch. 364.

(4) [1905] 2 Ch. 400.

(5) 3 Mer. 17.

(6) 10 Ves. 522.

all that is required is that the description of the class to be benefited shall be sufficiently certain to enable men of common sense to carry out the expressed wish of the testator. This can clearly be done here. The trusts of the will are neither vague nor indefinite, although peculiar. The intention shown is to effect a public purpose. A benignant construction should be placed upon charitable bequests. The provision of a periodical "dinner" to the trustees is merely machinery by which his intention can be carried out. "Healthy recreation" in the use of musical instruments, and the exercises of singing classes, choir practice, and the local band is, I submit, a charitable purpose. The health of the community has been recognized by the Legislature to be a matter of general public interest. Under the Public Health Act express authority is conferred on municipalities to levy rates for such objects; *a fortiori* the intention of the testator for a similar purpose should be carried out. If the Court hold the bequest for the dinners, and to provide for the town "band," to be void, I submit that under the terms of the will they will fall into the residue. If the Court should decide that they do not fall into the residue, then they should be administered *cy-près*. The same principle should also be applied in reference to the trust for the accumulation of income in so far as the Court comes to the conclusion that it is void: *Weir v. Crum-Brown* (1).

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*Richard Best, in reply—*

[In addition to the cases above referred to, *Harington v. Watts* (2) was also cited.]

BARTON, J.:—

The trust estate which was devised by this will consisted both of realty and personalty. The testator devised this mixed estate to his two executors and to the Portadown Urban Council upon the trusts thereafter contained. References in the will to the Urban Councillors "for the time being" occasioned some discussion. The words "for the time being" occur three times in

(1) [1908] A. C. 162.

(2) [1905] 2 Ch. 60.



*Barton, J.* the will; and seem to me to refer not to a single date such as the  
 1910. death of the testator, but to the continuous existence of a corporate  
 SHILLINGTON body, the members of which vary from time to time.

*v.*  
 PORTADOWN The first question is, whether the Urban Council can take  
 U. D. C. these lands as devisees. They can hold land for the purpose of  
 their powers and duties: *vide* the Local Government (Application  
 of Enactments) Order, 1898, Article 13 (1). They can hold  
 property in joint tenancy wherever they can hold it in severalty:  
*vide* The Bodies Corporate (Joint Tenancy) Act, 1899, 62 & 63  
 Vict. c. 25. But can they hold land as devisees in trust in the  
 manner contemplated by this will? I think not. This, however,  
 will not prevent the Court giving effect to the testator's inten-  
 tions by means of a scheme, which will provide, if necessary, for  
 the appointment of trustees, and will have regard to the fitness of  
 the Council to assist in carrying out a trust for the benefit of the  
 town and neighbourhood.

The testator proceeds to empower his trustees to retain the  
 trust property in its present form, and goes on to give four direc-  
 tions as to the application of the income of the trust estate. The  
 last of these four directions deals with the balance or residue of  
 the income, and is in the nature of a residuary disposition. So  
 much turns upon the construction of this, the principal disposition  
 in the will, that it will be convenient to deal with it in the first  
 instance. It runs as follows:—"And in the fourth place I  
 direct that the balance of the income derived from my estate  
 shall be applied by my trustees for the purpose of fostering,  
 encouraging, and providing the means of obtaining healthy  
 recreation, including the teaching of singing in classes or choruses,  
 for the residents of the town of Portadown and the surrounding  
 districts, and for the purpose of providing music and instruments  
 (in so far as my trustees think advisable) for the town band, in  
 such manner and form as my trustees shall in their absolute dis-  
 cretion consider best, but in no case shall my trustees pay away  
 any moneys derived out of my estate for prizes for football or for  
 running for speed."

This direction to the trustees as to the application of the balance  
 or residue of the income of the trust estate constitutes, in my  
 opinion, a valid charitable devise and bequest. The testator's

purpose was a charitable or public purpose. He wished to benefit the residents of his native town and of its immediate neighbourhood. The benefits which he intended to confer on them were such as he believed to be of public advantage. That belief was rational and not contrary to the laws of the land or the principles of morality. His intention and belief are sufficiently expressed in the will, and are to be gathered from the fair and natural construction of the words of the gift, and are confirmed and justified by the tenor and provisions of the rest of the will. If I am right in thus describing it, it is clearly a valid charitable gift.

Looking at the rest of the will, we have several indications of a general intention to benefit the local public, which are worthy of notice. In the first place, we have the testator appointing the local Urban Council, the representative and administrative public body of the district, to be trustees with his executors. Secondly, we have a direction that there is to be a quinquennial symposium which is to include not only the Urban Councillors, but the Town Clerk for the time being, who are to meet for the purpose of discussing the will and getting suggestions for carrying out the trusts. Thirdly, we have a direction that the executors shall be an advisory committee to the Urban Councillors for the time being, indicating that the execution of the trusts is to be entrusted to the local public body, and that the executors are to have merely an advisory influence. Fourthly, there is a direction that the accounts of the trust estate are to be published once annually in a local newspaper "so that the public may see how the estate is managed." Fifthly, we find that, in the gift itself, the testator expressly names the residents of the town and surrounding district as the objects of his bounty. It is quite true that the mere appointment of a municipal body as trustee does not make the trust a charitable one. But it is an element which, with other circumstances such as I have mentioned, aids the Court in coming to the conclusion that the testator contemplated public and not private purposes and benefits.

It has been contended that the trustees might, within the wide discretionary power given to them, apply part of the income to

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*Barton, J.* 1910. some non-charitable object. But the testator gives an example of what methods of obtaining healthy recreation for the residents he intends to include, and examples of what he means to exclude. *SHILLINGTON v. PORTADOWN U. D. C.* He says that he means to include the teaching of singing in classes or choruses, which in itself would be a good charitable object. I reserve the reference to the town band for special consideration. He says that he means to exclude prizes for football, or running for speed. These are examples of a purpose to encourage mere sport and amusement which in themselves might not be charitable: *In re Nottage* (1). It is true that he has not in his will drawn up exhaustive categories of objects which the decided cases have held to be respectively charitable or non-charitable. But that is not necessary. All these examples of what he means are in harmony with a charitable public purpose. The practical rule is whether, on the fair and rational construction of the words used, all the purposes are charitable and public purposes: *Wrexham Corporation v. Tamplin* (2); *Dolan v. MacDermot* (3); *In re Allen* (4).

The arguments against the charity were mainly concentrated upon the town band. Indeed, the language of the gift itself would, I think, leave no room for doubt as to its public purpose if it were not for the words, "and for the purpose of providing music and instruments (in so far as my trustees think advisable) for the town band." It appears that there was in Portadown a band, known as the town band, and supported by voluntary contributions. It was a local feature of some local public interest, and it occupied at a nominal rent a part of the town hall for its practice. But, although it had a public habitation and name, it had not and could not have any official, municipal, or other public status. Counsel for the next-of-kin and heir-at-law have contended that this sentence about the town band must be treated grammatically as a separate water-tight gift for the benefit of a private band. If that is the true construction, it would not be a legal charitable gift. If the intention was primarily to benefit the band, it would be immaterial that the result would be to

(1) [1895] 2 Ch. 649.

(3) L. R. 5 Eq. 60.

(2) 21 W. R. 768; 28 L. T. (N. S.)

(4) [1905] 2 Ch. 400, 407.

benefit the town. The purpose would not be public and charitable; and the only question which would arise would be, whether the residuary gift failed altogether, or was divisible; and if divisible, whether it failed moietywise, or in proportion to the benefit intended for the band, which proportion would in that view of the gift, have to be ascertained by an inquiry at Chambers.

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But, after giving the matter the best consideration that I can, I have come to the conclusion that this "water-tight" construction is not the fair or rational one. The expressed purpose of the testator, to be gathered from the context and from the entire will, was to benefit the town, and not to benefit the band. So little does he care for the band as a private organization for its own sake, that he leaves it to the discretion of the trustees whether anything is to be given to the band or not. They are only to benefit the band in so far as the trustees, *i.e.*, the local Urban Council, with the advice of the executors, think advisable. If they do not think it advisable, in their discretion, they need not provide any music or instruments for the town band. Advisable from what point of view? Can there be any doubt that it would be from the point of view of providing means of healthy recreation for the residents. To provide music and instruments for a town band would seem to be a typical means of providing healthy recreation for the residents of a busy town. After naming the general purpose of providing means for the healthy recreation of the inhabitants, he goes on to name a particular way of carrying out his general purpose, namely, providing music and instruments for the town band, in so far as his trustees think advisable.

Reference was made to the Public Health Acts (Amendment Act), 1907 (7 Edw. 7, c. 53). Part VI. of that Act recognizes the public advantage of recreation grounds, and empowers the Local Government Board in England and Ireland to make rules and prescribe conditions, and give their approval of a limited rate. Subject to the exercise of the powers of the Local Government Board the local authorities are given wider powers than they formerly possessed in reference to enclosing and maintaining parks and pleasure grounds. By sect. 76, sub-sections (d) and (e), they



*Barton, J.* are empowered to provide or contribute towards the expenses  
 1910. of any band of music to perform in the park or ground ; and  
 SHILLINGTON to enclose any part of the park or ground not exceeding one  
 v. acre, for the convenience of persons listening to any band of  
 PORTADOWN music, and charge admission thereto. It is immaterial that the  
 U. D. C. Local Government Board in Ireland have not yet made rules or  
 prescribed conditions, or approved of a limited rate. This is a  
 statutory recognition of the public usefulness of this particular  
 means of healthy recreation for an urban population. It seems  
 to me that it would be as reasonable to attribute to the Legisla-  
 ture the intention to benefit the particular civil or military  
 band to which the local body might contribute under that section,  
 as to attribute to this testator the intention to benefit this private  
 band. He was not thinking of benefiting the individuals who  
 played the trombone, big drum, and other instruments, but  
 of benefiting the residents in the town ; and the music and  
 instruments for the band were mere expedients for procuring  
 healthy recreation for the people of the town and neighbourhood.

Few people who have any acquaintance with urban districts,  
 of which Portadown is a type, will fail to recognize that the  
 testator's purpose was not merely public, but was rational and  
 well directed. To provide means of healthy recreation for the  
 residents is to supply a want in the social life of these busy com-  
 munities. To provide music and instruments for a local band is  
 an obvious way of carrying out that purpose. The testator, in my  
 opinion, intended to benefit the local public in ways which are both  
 rational and legal. I think I should be catching at straws if I  
 were to hold that the purpose of any part of this bequest and  
 devise was other than a charitable and public purpose.

The result of holding that this residuary gift is charitable is  
 to simplify the minor questions which have been discussed. The  
 testator at the beginning of the will authorized but did not direct  
 his trustees to retain the trust property in good order and repair.  
 This direction involves a variable outgoing, and consequently a  
 varying residue. The two directions for accumulation of annual  
 sums of £100 and £5 are ancillary, and in aid of the general  
 charitable purpose. They are, in effect, mere directions as to the

application of particular parts of the charitable fund. If the preliminary directions fail, they will become applicable to the general charitable purpose, or will fall into the residue; and the next-of-kin and heir-at-law have no interest in them. Any questions with reference to them can be discussed at a later stage in connexion with the details of the scheme.

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1910.  
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For the present it is enough to say, as regards the directions to accumulate £100 a year for two lives and twenty years, that the *Thellusson Act* does not apply to Ireland. There are two alternative purposes of accumulation, (1) the buying out of head-rents, and (2) the augmenting of capital. If the former offends the *Accumulation Act*, 1892 (55 & 56 Vict. c. 58, sect. 1), in which the word "land" has to be construed by reference to the *Interpretation Act*, 1889, sect. 3, the effect would apparently be to strike out the illegal purpose, and to leave the other alternative direction to operate: see *In re Clutterbuck* (1); *In re Baroness Llanover* (2).

The next direction is to retain £5 annually for a dinner. One purpose of that direction would appear to be to obtain suggestions in aid of the general charitable purpose; and it was intended that the dinner should be given and that the guests should be invited by the trustees, who were to comprise the two executors and the fifteen urban councillors. It was not intended that trustees appointed by the Court or under a scheme should give a dinner and invite guests. The large change which takes place in the constitution of the trustees, owing to the incapacity of the urban council to take the devise, seems to make this direction inoperative and impossible of being carried out in accordance with the intention of the testator. I do not, however, give any definite decision as regards these two directions, at this stage of the suit.

In the view which I take of the charitable character of the principal devise, the only parties concerned in these minor questions are the trustees and the Attorney-General; and I decide nothing that will prevent the question of the accumulation fund and dinner fund being reconsidered in connexion with the scheme, the

(1) [1901] 2 Ch. 285.

(2) [1903] 2 Ch. 330.

*Barton, J.* next-of-kin and heir-at-law having, in my opinion, no concern  
1910. with these questions.

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Solicitors for plaintiffs : *Best & Best.*

Solicitors for the defendant Elizabeth Watson : *George  
Bernard & Son.*

Solicitor for Portadown Urban Council : *A. T. Farrell.*

Solicitor for the heir-at-law : *J. S. Bright.*

R. W. L.

## O'CONNOR v. O'CONNOR (1).

Appeal.  
1911.

*Will—Construction—Charitable legacy of “10 per cent. of my money”—  
Meaning of “money.”*

Feb. 23.

A testator gave 10 per cent. of his money in charity, and bequeathed the rest of his property to his children, share and share alike.

*Held*, that “money” included besides money at testator’s call, Consols, stocks that could be immediately turned into cash, and arrears of rent of real and personal estate belonging to the testator, but not capital sums secured by mortgages.

This was an appeal from portion of an order of the Master of the Rolls, dated the 5th July, 1910, made on the hearing of an originating summons instituted by the plaintiff as administrator with the will annexed of James Charles O'Connor, for the determination of certain questions arising under the will of the said testator, who was at the date of his will a person under the care of the Lord Chancellor, in lunacy. The will was in the following terms:—“I, James Charles O'Connor, being of sound mind, though feeble in body, make this my last will, I give 10 per cent. of my money in charity, and the rest of my property to my son Patrick, and my four daughters, share and share alike.” The property of the deceased consisted of the following items which were set out in the schedule to the summons—(1) £1161 14s. 6d. New Consols and dividend accrued thereon; (2) £40, being one-fifth of £200, 4 per cent. bonds of the Sligo Harbour Board; (3) £240, being one-fifth of £1200 4 per cent. bonds of the Sligo Harbour Board; (4) £1532 1s. 11d. Dublin Corporation 3¼ per cent. stock; (5) £1278, Guaranteed Preference Stock, of the Great Southern and Western Railway Company; (6) £1230 Debenture Stock of the Midland Great Western Railway of Ireland Company; (7) £75 Guaranteed Stock of the Cavan and Leitrim Railway Company; (8) twenty shares in the Gas Light

(1) Before THE LORD CHANCELLOR, and LORDS JUSTICES HOLMES and CHERRY.



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*O'CONNOR.*

Company of Sligo; (9) £4829 11s. 5d. lent on mortgage to Pierce O'Mahony; (10) £1000, portion of £5000 lent on mortgage to W. F. Crowe; (11) £360, portion of £1800 lent on mortgage to M. J. Balfe; (12) £100 portion of £500 lent on mortgage to Archibald Gilchrist; (13) accruing interest on above mortgages and accruing dividends on investments; (14) £61 10s. 4d., being one-fifth of the cash balance in the hands of Mr. John Mulhall, one of the trustees of the will of Peter O'Connor, deceased; (15) £227 15s. 1d., cash in hands of receiver in matter of James Charles O'Connor, a person of unsound mind, or such other sum as may be found due on his account; (16) £61 cash in name of the Accountant-General to the credit of the lunacy matter; (17) furniture and other personal chattels; (18) arrears of rents of real and personal estate; (19) apportioned parts of accruing gales of rent; (20) one-fifth of premises held under a term of years; (21) freehold hereditaments in the counties of Mayo and Sligo. The Master of the Rolls, in answer to the question contained in the summons, Which of the several properties specified in the schedule hereto is or are included under the term "money"? (with which alone this report deals), held that the term included all the testator's property except the freehold hereditaments at item 21 in the schedule. From this decision the plaintiff now appealed.

*Poole* (with him, *S. L. Brown, K.C.*), for the appellant:—

We submit that too wide a meaning has been given to the word "money," which should be confined to its proper sense of ready money and money available at the call of the testator, there being nothing in the will to indicate a different intention; see judgment of Page-Wood, V.-C., in *Langdale v. Whitfeld* (1); *In re Cadogan* (2); *Lowe v. Thomas* (3); *Byrom v. Brandreth* (4); *Williams v. Williams* (5); *In re Hunter* (6); *Collins v. Collins* (7). All the testator's consols, stocks, and shares should be excluded, and also the mortgage debts vested in him; as to these, the deeds,

(1) 4 K. & J. 426, at 432.

(5) 8 Ch. D. 789.

(2) 25 Ch. D. 154.

(6) 25 T. L. R. 19.

(3) 5 D. M. & G. 315.

(7) L. R. 12 Eq. 455.

(4) L. R. 16 Eq. 475.

with the exception of item No. 10, provide that the mortgages are not to be called in until 1913, and accordingly, even if "money" could be extended to include stocks and shares which could be immediately realized, the term cannot include these mortgages.

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*Molony, K.C., J. Linehan, and Hugh Kennedy, for the Attorney-General:—*

By the word "money" the testator must be taken to have meant his entire personal estate. The position of the testator must be taken into consideration; he was a lunatic under the care of the Chancellor, and had no money in hand, or at call at all. *Prichard v. Prichard* (1) rules this case. *In the Goods of Bramley* (2) also shows that no absolute meaning can be given to the word "money," which there was held to cover all testator's personal estate. *In re Cadogan* (3) is in our favour, and also *Langdale v. Whitfeld* (4); *Shelmer's Case* (5); *Finlay's Estate* (6); *Townley v. Townley* (7).

*Brown, K.C., replied.*

THE LORD CHANCELLOR:—

Every will like this depends upon its own language; reported cases give us very little assistance, and we have to make up our own minds as to what the testator intended by the words he used.

I think that the words here must be taken to include something more than Mr. Poole has contended; something more than what in law would pass by them.

The words, "I give 10 per cent. of my money" are opposed to the narrow construction pressed upon us, and so also is the bequest of "the rest of my property to my son Patrick, and my four daughters." Therefore we must hold that the term includes something more than is conveyed by the mere legal sense of the word "money." The items in the schedule that are properly covered by the words are, in my judgment, 1, 4, 5, 6, 7, 8,

(1) L. R. 11 Eq. 232.

(2) [1902] P. D. 106.

(3) 25 Ch. D. 154.

(4) 4 K. & J. 426.

(5) Gil. Eq. R. 200.

(6) 5 N. I. J. R. 166.

(7) 32 W. R. 549.

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Chancellor.

14, 15, 16, and 18. Nos. 2 and 3 will be excluded, as the bonds were not presently redeemable at the testator's death; none of the mortgages will pass; we have it on affidavit that the mortgage deeds, with the exception of that at No. 10, contain provisions that the money is not to be called in until 1913. I do not agree with Mr. Molony's proposition that the testator's interest in these mortgages could properly be called money in any sense of the word.

HOLMES, L.J. :—

In considering this particular will, we must bear in mind the legacy we have to deal with, namely, a charitable legacy of "10 per cent. of my money." I think these words sufficiently show that what was contemplated by the testator was not a gift of 10 per cent. of all his personal estate, which he would have hardly so described, but of either money immediately due and available, or of certain securities which could be immediately turned into money; that being so, there must be excluded from this bequest money which the testator could not have called in or realized at once, and that is the effect of the judgment of the Lord Chancellor, in which I concur.

CHERRY, L.J. :—

I agree. I think that what the testator meant to include in the term "money" was cash due at his death, of which he could claim immediate payment, and such stocks, shares, and securities as could be turned into cash immediately after his death. That construction covers all the items the Lord Chancellor has mentioned, and excludes all others.

Solicitor for the appellant: *C. H. Denroche.*

Solicitor for the Attorney-General: *J. E. M'Dermott.*

R. ST. J. C.

IN THE MATTER OF THE ESTATE OF FRANCES COLLIS. *Wylie, J.*  
1911.

*Lands settled subject to an annuity—Power of sale in trustees during life of tenant-for-life—Sale by tenant-for-life under the Land Purchase Acts carried through—Death of tenant-for-life after purchase-money advanced—Remainderman absolutely entitled—Continuing proceedings—Payment out of residue—Trustees for purposes of Settled Land Acts—Appointment of.*

May 17.  
June 1.

Lands settled subject only to an annuity (not secured by a term) were, in the events that happened, limited to F. for life, with remainder to P. absolutely. By the settlement, the trustees were given a power of sale during the life of F. F. sold the settled lands under the Land Purchase Acts, and died after the purchase-money had been advanced. The final schedule had been settled on the assumption that the residue would be paid to the trustees of the settlement. The annuitant objected, claiming to be put on the final schedule on the ground that the settlement was at an end.

*Held* (1) that, as a matter of form, an order should be made continuing the proceedings in the name of P.; and (2) that the moneys in Court being capital moneys arising from the sale of the settled lands, which had been carried through by the tenant-for-life under the Settled Land Acts, the Court had power to appoint trustees for the purposes of the Settled Land Acts, and to pay the residue to them to be held upon the trusts of the settlement.

*Semble*, on the death of F., the trustees of the settlement ceased to be trustees for the purposes of the Settled Land Acts. *In re Mundy and Roper's Contract* ([1899] 1 Ch. D. 275) and *In re Wimborne and Brown's Contract* ([1904] 1 Ch. D. 537) distinguished.

OBJECTION to the Final Schedule of Incumbrances.

The facts, as stated in the judgment of Wylie, J., were as follows :—

By his will Hugh Gough Collis bequeathed to his wife for her life an annuity of £500, and devised the lands which had been sold in this matter to trustees, subject to said annuity, for his two sisters, Frances Collis and Gertrude Collis, in equal moieties for life, with limitations over in favour of their respective children; and, in default of issue of either, for the survivor in the same manner as her original share; and on the death of the



*Wylie, J.* survivor, in case both died without issue (which event happened),  
 1911. for George Stephens Gough absolutely, if he should be then living,  
*In re* and if not for the eldest son of George Stephens Gough. In the  
*COLLIS'S* events that happened, the said Frances Collis became tenant-for-  
*ESTATE.* life of the entire lands, and upon her death on the 15th February, 1911, George Patrick Gough, eldest son of the said George Stephens Gough, became absolutely entitled to the said lands, having attained age on the 29th March, 1910. The said Frances Collis, as such tenant-for-life, sold the settled lands under the Land Purchase Acts. The said lands had been vested, and the purchase-money lodged to the credit of the estate, prior to the death of the vendor; and the only questions that remained related to the payment out of the purchase-money. The trustees of the will of Hugh Gough Collis had a power of sale during the life of the tenant-for-life and the minority of the remainderman, and it was admitted that, during the life of the vendor, they were trustees for the purposes of the Settled Land Acts of the settlement created by said will. The annuitant was still alive. The final schedule which had been settled did not set out the annuity or the arrears thereof. The annuitant objected.

The following questions arose on the objection :—

(1) Whether it was necessary that an order to continue the proceedings should now be made? and

(2) Whether the trustees of the will of Hugh Gough Collis were, in the events that had happened, still trustees of the settlement created by said will for the purposes of the Settled Land Acts, to whom capital moneys arising from the sale of settled lands could be paid?

*Donaldson*, for the annuitant :—

The title of the proceedings ought to be amended, and continued in the name of the remainderman, who is now absolutely entitled, even though the sale has been completed.

Further, the annuitant should be put on the final schedule in respect of her claim. The settlement is at an end. The lands are no longer limited by way of succession within the meaning of

section 2 of the Settled Land Act, 1882. Unless estates are limited by way of succession, there is no settlement within the Settled Land Acts: *In re Pocock and Prankerd's Contract* (1); *Bates v. Kesterton* (2). The power of sale conferred on the trustees of the settlement ceased on the death of the vendor, and accordingly the trustees are no longer trustees for the purposes of the Settled Land Acts. A power of sale cannot be exercised when all the uses of the settlement (except a jointure, even where secured by a term) are spent: *Wolley v. Jenkins* (3). As the settlement is at an end, the Court has no power to appoint trustees for the purposes of the Settled Land Acts.

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*Macrory*, for the trustees of the will of Hugh Gough Collis:—

When the vendor dies after the purchase-money has come to credit, an order to continue the proceedings is unnecessary, as the sale is complete.

As to the second point, under section 32, sub-section 2, of the Settled Land Act, 1882, the successor in title can carry out the contract by conveying so as to override any charge, subject to which the tenant-for-life could have conveyed. The settlement created by the will is still subsisting. The annuity together with the remainder in fee constitute a succession: *In re Mundy and Roper's Contract* (4); *In re Wimborne and Brown's Contract* (5). Even if the trustees are no longer trustees for the purposes of the Settled Land Acts, by reason of their power of sale having come to an end, the Court has power now to appoint them as such. The effect of the order attaching claims was that the claim of the trustees to be paid the residue attached to the purchase-money prior to the death of the vendor.

WYLIE, J.:—

June 1.

(His Lordship stated the facts as above set out, and continued). As to the first question, as a matter of form, I think, where it is asked for, an order to continue the proceedings should be made before anything further is done, as some authorized person should

(1) [1896] 1 Ch. D. 302.

(4) [1899] 1 Ch. D. 275.

(2) [1906] 1 Ch. D. 159.

(5) [1904] 1 Ch. D. 537.

(3) 23 Beav. 53.

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1911.

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ESTATE.

have carriage of the proceedings. I shall, accordingly, make an order continuing the proceedings in the name of George Patrick Gough.

The final schedule which has been settled does not set out the annuity of £500 or the arrears thereof, it being the intention of George Patrick Gough, the remainderman under the settlement, and now the absolute owner subject to the annuity, that the residue of the purchase-money available for the trusts of the settlement should be paid to the trustees of the settlement. The objection raised to this course is that, as alleged by the annuitant, the trustees of the settlement ceased, upon the death of the vendor, to be trustees for the purposes of the Settled Land Acts. The contention is, that the lands are no longer limited by way of succession, that the owner in fee in remainder having attained age, and his estate having fallen into possession, the settlement is at an end, and that the power of sale conferred by the settlement upon the trustees during the life of the tenant-for-life and the minority of the remainderman no longer exists. It is suggested by the other side that, as the charge created by the settlement still subsists, that charge, together with the remainder in fee, constitute a succession, and I was referred to the cases of *In re Mundy and Roper's Contract* (1) and *In re Wimborne and Brown's Contract* (2) as authorities for that proposition. But in these cases there was a term of years limited to secure the jointure and charges, which was probably the ground of these decisions. I can find no case extending these decisions to a mere charge of an annuity, and, therefore, if it were necessary for me to decide the question, I would be disposed to hold that these trustees had ceased to be trustees for the purposes of the Settled Land Acts.

But the view I take of the case is this. It being admitted that this is a sale of settled lands, carried through and completed by a tenant-for-life under the Settled Land Acts, and the moneys in Court being capital moneys arising from such sale, and it being doubtful whether the existing trustees of the settlement are any longer trustees for the purposes of the Settled Land Acts, I have

(1) [1899] 1 Ch. D. 275

(2) [1904] 1 Ch. D. 537.

power, on the application of the owner, and there being no objection to the fitness of the existing trustees, to appoint them trustees for the purposes of the Settled Land Acts, and to pay them the residue to be held by them upon the trusts of the settlement. I will make an order accordingly.

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*In re*  
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Solicitors for the annuitant: *Hamilton and Craig.*

Solicitors for the trustees: *Whitney and Moore.*

J. E. W.

IN THE MATTER OF THE ESTATE OF ARTHUR E. L.  
MAUNSELL.

*Ross, J.*  
1911.

April 20, 26.

*Statute of Limitations* (3 & 4 Wm. 4, c. 27), s. 2—*Renewable Leasehold Conversion Act*, 1849 (12 & 13 Vict. c. 105)—*Fee-farm rent—Non-payment—Extinction.*

A fee-farm rent created by and payable under a fee-farm grant made in pursuance of the Renewable Leasehold Conversion Act, 1849, is a rentcharge and not a rent service.

Where such a rent had remained unpaid for more than twelve years, and no acknowledgment had been given in respect thereof, the same was held to be barred by the Statutes of Limitations (3 & 4 Wm. 4, c. 27, and 37 & 38 Vict. c. 57).

OBJECTION TO FINAL SCHEDULE OF INCUMBRANCES.

By a lease for lives renewable for ever, dated 25th November, 1738, and made between Margaret King of the one part, and William Lloyd of the other part, the town and lands of Gortnecarry sold in this matter, and other lands were demised to the said William Lloyd for the lives of Thomas Lloyd, junior, Robert Bradshaw, and John Bradshaw, first and second sons of John Bradshaw, at the yearly rent of £20, late Irish currency, payable on the 1st May and 1st November, and the said lease contained a proviso for perpetual renewal on payment of £10 of the said late Irish currency on the fall of each life.

The said lease was several times renewed, the last renewal being dated the 13th January, 1847, made between Edward



*Ross, J.* Cripps Villiers of the first part, Richard White of the second part, and Mary Ryan of the third part.  
1911.

*In re*  
MAUNSELL'S  
ESTATE.

By deed, dated the 25th January, 1868, made between Samuel Frederick Adair of the first part, Thomas Lloyd of the second part, and John Troup of the third part, reciting the said indenture of lease, dated 25th November, 1738, and the renewals thereof, and that Samuel F. Adair had purchased in the Incumbered Estates Court the estate and interest of the lessor in the said indenture of lease, and obtained a conveyance of the said interest from the Commissioners of said Court, dated the 17th August, 1850, in trust for Thomas Lloyd, his heirs and assigns for ever, subject to the said recited indenture of the 25th November, 1738, and the renewal thereof of the 13th January, 1847, and reciting that, under the provisions of 12 & 13 Vict. c. 105 (intituled An Act for converting the Renewable Leasehold Tenure of Land in Ireland into a Tenure in Fee), the estate and interest of the said Margaret King, the lessor in the said original indenture of lease, and of Edward Cripps Villiers and Richard White, lessors in the last renewal thereof, were then vested in the said Samuel F. Adair, in trust for the said Thomas Lloyd, and all the estate and interest of the said William Lloyd, the lessee in the said original indenture of lease, and of the said Mary Ryan in the said last renewal thereof, had come to and was then legally vested in the said John Troup, and that the said John Troup had paid to the said Samuel Frederick Adair as trustee of the said Thomas Lloyd the sum of £26 16s. 2d., being the renewal fines and interests payable upon the deaths of two of the lives in the last renewal, and it had been agreed that 11s. 6d. should be added to the yearly rent of £20 Irish currency in lieu of the renewal fines and fees payable on the fall of each life, making together the perpetual rent of £19 1s. present currency. It was witnessed that in pursuance of the provisions of the said Act of Parliament, and in consideration of the said yearly fee-farm rent of £19 1s. the said Samuel Frederick Adair, by direction and with the privity of the said Thomas Lloyd, testified by his execution of the said indenture, granted and conveyed unto the said John Troup and to his heirs and assigns, all that and those the said lands and premises, that is to say, the lands of Gortnesearry and other

lands, to hold the same lands unto and to the use of the said John Troup, his heirs and assigns for ever, at the yearly rent of £19 1s.

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*In re*  
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ESTATE.

Since 1873 no payment on foot of the said rent had been made by anyone, and no acknowledgment in respect of the said rent had been given to anyone.

The rent of £19 1s. was set out at No. 11 on the final schedule of incumbrances. The objection of Alexander James Troup, son of the said John Troup, objected to the said rent on the ground that the right to recover the said rent had long since become barred by the Real Property Limitation Acts (1).

*Pim, K.C.* (with him *Frank Fitz Gibbon*), for the objector:—

The question whether section 2 of the Act 3 & 4 Wm. 4 applied to leases for years first arose in *Paget v. Foley* (2), where it was held that the section only applied to rents which are hereditaments, rents for which an assize or real action would lie. In *Grant v. Ellis* (3), Rolfe, B., held that a rent reserved under a lease was not barred, as the section applied only to rent-charges, and not to rents reserved under leases for years. There must be an interest in the person receiving the rent: *Prescott v. Boucher* (4). There is no reversion to a fee-farm rent. Therefore section 2 applies to a fee-farm rent. In *Dean of Ely v. Bliss* (5) it was held that tithes are not within section 2. In *Archbold v. Scully* (6) it was held that the landlord's right to a rent was not

(1) Section 2 of the Act 3 & 4 Wm. 4, c. 27, provides "that after the 31st day of December, 1833, no person shall make an entry or distress or bring an action to recover any land or rent but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or to bring such action shall have accrued to the person making or bringing the same." By section 1 of the Real Property Limitation Act, 1874, the period of twenty years, fixed by section 2 of the Act 3 & 4 Wm. 4, c. 27, was altered to twelve years.

(2) 2 Bing. N. C. 679.

(5) 2 D. G. M. & G. 459.

(3) 9 M. & W. 113.

(6) 9 H. L. C. 360.

(4) 3 B. & Ad. 549.

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barred by non-payment, but in that case Lord Cranworth was only thinking of the case of a landlord and tenant under a lease: *Irish Land Commission v. Grant* (1). In *Howitt v. Earl of Harrington* (2), section 2 was held to apply to a copy-hold rent. So also in *Jones v. Withers* (3), where a rentcharge was held to be barred under section 2. So also as to a quit-rent issuing out of freeholds: *De Beauvoir v. Owen* (4).

In a fee-farm grant the landlord has an estate or interest in the rent which he might have recovered by an assize. Deasy's Act (23 & 24 Viet. c. 154) makes the grantor have the interest of a landlord in order to give him and the tenant certain remedies; but that does not alter the essential nature of the rent. The fee-farm rent is a rent in which the landlord has the fee-simple: *Irish Land Commission v. Holmes* (5).

*H. D. Conner, K.C.* (with him *Longfield*), for the owners of the fee-farm rent of £19 1s. :—

Up to *Quia Emptores* a landlord let to a tenant for a rent service. The *redditus* was payable only on the expiration of every half year (Coke Litt. 141 (b)). Section 2 of the Act of Wm. 4 only applies where there is a rentcharge, not where there is the relation of landlord and tenant: *Crosbie v. Sugrue* (6); *Daly v. Lord Bloomfield* (7); *In re Turner's Estate* (8). A grant in fee reserving a perpetual rent, executed since Deasy's Act, creates the relation of landlord and tenant: *Kelly v. Rattey* (9); *In re M'Naul's Estate* (10); *In re Garde Browne* (11); *Christie v. Peucocke* (12); *Adams v. Alexander* (13).

Where the rent service is a mere rentcharge, and the person receiving it has no interest in the land save to take the charge, it is within section 2, but where it is a rent service it is not within section 2: *Angell v. Angell* (14); *Morris v. Morris* (15); *Baines*

(1) 10 A. C. 14.

(2) [1893] 2 Ch. 497.

(3) 74 L. T. (N.S.) 572.

(4) 5 Ex. 166.

(5) 32 Ir. L. T. R. 85.

(6) 9 Ir. L. R. 17.

(7) 5 Ir. L. R. 65.

(8) 11 Ir. Ch. R. 304.

(9) [1894] 2 I. R. 226.

(10) [1902] 1 I. R. 114.

(11) [1911] 1 I. R. 205.

(12) 30 L. R. Ir. 646.

(13) [1895] 2 I. R. 363.

(14) 9 Q. B. 328.

(15) Ir. R. 7 C. L. 295.

v. *Lumley* (1). Not a single case has been cited on behalf of the objector where a rent service has been held barred.

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*Longfield*:—

No intelligible distinction exists between the two forms of rent except (1) where the relation of landlord and tenant exists, and (2) where it does not exist. Section 2 is limited to the case where no relation of landlord and tenant exists. The Renewable Leasehold Conversion Act preserved, as far as possible, all the previously existing rights and obligations of both landlord and tenant: *Gore v. O'Grady* (2).

*Frank Fitz Gibbon*, in reply:—

There may be a rent service with an ordinary rent, or a rent service in which the owner may have an estate. Section 2 does not apply to occupation rents, but does apply to rent services, rent-charges in which a person may have an estate. In *Grant v. Ellis* (3) the rent was a conventional rent payable by a person who had no estate in the lands. *The Irish Land Commission v. Holmes* (4) decided that all the estate of the grantor in the lands is taken out of the grantor and put in the grantee, and all that the grantor has is an estate in the fee-farm rent.

The Irish Land Code makes the relation of landlord and tenant exist, and gives the grantor all rights and remedies of recovery such as a landlord has, but does not change the nature of the rent: *In re M'Naul's Estate* (5). The grantor is stripped of his lands. The rent payable to him henceforth is payable to him not in respect of an estate in the lands, but independently of such. He has an interest or estate in the rent independently of any estate in the lands. The only rent to which section 2 does not apply is a rent payable to a person in respect of an estate in the lands: *Irish Land Commission v. Grant* (6).

*Phelps*, for the vendor.

(1) 16 W. R. 674.

(2) Ir. R. 1 Eq. 1.

(3) 9 M. & W. 113.

(4) 32 Ir. L. T. R. 85.

(5) [1902] 1 Ir. R. 114.

(6) 10 A. C. 14.



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The question in dispute arises between two owners of superior interests on this estate. An immediate rent of £120 (Ir.) has been redeemed. There is a higher rent of £20 (Ir.) charged upon the said rent. The higher rent is created by a fee-farm grant, dated 25th January, 1868, made in pursuance of the Renewable Leasehold Conversion Act. The higher rent has not been paid for more than thirty years. The owner of the lower rent contends that it is extinguished by the Statutes of Limitations. The precise point has never yet been actually decided.

By sect. 2 of the Real Property Limitation Act, 1833, no land or rent can be recovered but within twenty years after the right of action accrued. What does the word "rent" mean in this section?

There are two kinds of rent—rent-service and rentcharge. If this £20 Irish is of the nature of a rentcharge, it is barred. If it is of the nature of rent-service, it is in existence and must be redeemed. The definition section gives no assistance. It is wide enough to cover both kinds of rent. The word "rent" occurs continually through the Act. Sometimes it means rent-service and sometimes rentcharge. Which it is depends on the enacting provision and the context. As pointed out by Lord Denman, in one section, the 9th, it occurs seven times—in four cases meaning rent-service, and in three cases meaning rentcharge.

Now, a rentcharge means a rent existing as a hereditament distinct from the land, for which the parties entitled might have had an assize. A rent-service is something very different. It is incident to the relation of landlord and tenant, and is reserved in a lease for years. It is the conventional sum payable by the tenant to the landlord for the use of the land, and is payable only when the period of occupation is complete, that is to say, on a gale-day, or at such time as may be arranged. The rentcharge is an incumbrance on the ownership; the rent-service is an incident of the ownership.

The statute had not been long in operation when Chief Justice Tindal, in *Paget v. Foley* (1), expressed an opinion that section 2

could only be applied in the case of rents for which an assize would lie, that is to say, rentcharges. Afterwards, in the case of *Grant v. Ellis* (1) the precise point was decided. The Court held that the 2nd section did not apply to conventional rents reserved upon leases for years, and that it only applied to rentcharges. The chief reasons for the decision set out in the elaborate judgment of Baron Rolfe are grounded on the existence of the word "recovery" in sect. 2, and the expression "estate or interest claimed" in section 3. This language can only be applicable to a rentcharge, and is wholly inapplicable to a rent-service.

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This decision has been accepted as good law, and acted on by both English and Irish Courts. We have, therefore, only now to determine which kind of rent is the subject of the present proceedings.

This brings us to a consideration of the Renewable Leasehold Conversion Act (2). It begins by reciting that many lands in Ireland are held under leases with covenants for perpetual renewal, and that great expense is constantly incurred in procuring renewals, and that it is expedient that such tenures should be converted into tenures in fee. It then goes on to enact that the owner of the lease may require the owner of the reversion to execute a grant of an estate of inheritance in fee-simple in such lands subject to a perpetual yearly fee-farm rent to be charged upon the lands and subject to like covenants and conditions for securing the payment of such fee-farm rent as are contained in such lease with respect to the rent reserved. In section 7 we find two estates of inheritance dealt with, one an estate of inheritance in the lands, and another an estate of inheritance in the fee-farm rent. In section 10 the owner of the lands is to be chargeable upon the covenants as if the lease were still subsisting. By section 20 the fee-farm rent is made recoverable by all the ways and means by which rent-service reserved in a common lease is recoverable.

The outcome of all this is that two estates in fee-simple are created, one an estate in the lands in the former lessee, the other an estate in the fee-farm rent in the former lessor, but carrying with it some of the incidents of tenure. The parties are no longer

(1) 9 M. & W. 113.

(2) 12 & 13 Vict. c. 105.

*Ross, J.* landlord and tenant. That is made plain and clear. No doubt  
 1911. remedies are conferred by the statute on the owner of the estate  
*In re* of inheritance in the rentcharge, similar to those that would have  
 MAUNSELL'S been available if the relation of landlord and tenant had still  
 ESTATE. subsisted. But when the estates have been once created by the  
 statute, surely the statutory remedies cannot alter the essence  
 and nature of the estate or revive the old relationship which has  
 been completely destroyed.

So far the matter would appear to be plain enough, but, as soon as we have to consider the Redemption of Rent Act, 1891, and the decisions thereupon, all manner of difficulties can be suggested. The Act of 1891 must be construed *in pari materia* with the Acts of 1881, 1885, and 1887. Definitions are put upon words altering their natural meaning. Things that are white are to be deemed to be black, and *vice versa*. The benefits conferred on tenants by the Act of 1881 are gradually extended to other classes, to lessees by an Act of 1887, and finally to grantees under fee-farm grants. The relationship of landlord and tenant, for the purposes of the particular statute, but only for such purposes, is assumed to exist between parties who are not landlords or tenants at all.

Here we are considering a matter wholly outside the scope of the Irish Land code, and the questions arising on the construction of these statutes do not really affect the matter I have now to decide.

I am of opinion that the rent of £20 Irish is a rentcharge and not a rent-service, and that it is "recoverable" within the meaning of section 2 of the Real Property Limitation Act, 1833, that it is a hereditament in which there can exist "an estate or interest claimed" within the meaning of section 3. It is therefore, in my opinion, barred by the statute, and I declare accordingly.

Solicitors for the objector : *Molloy and Molloy.*

Solicitors for the owner of the rent : *Moore, Keily, and Lloyd.*

Solicitors for the vendor : *Maunsell, Darley, and Orpen.*

## IN RE MERRICK; EX PARTE JOYCE (1).

Appeal.  
1911.

*Practice—Costs—Taxation—Bankruptcy of client—Undertaking by solicitor not to prove.*

May 8.

When a client who has obtained an order to tax his solicitor's bill of costs becomes bankrupt, his assignees, if the solicitor undertakes not to prove in the bankruptcy for the costs, cannot continue the taxation without giving an undertaking to pay the taxed amount of the bill.

APPEAL by E. E. Merrick from an order of the Master of the Rolls of the 25th April, 1911, and application that in lieu thereof the order made in this matter on the 15th March, 1911, be set aside on the ground that the last-mentioned order did not contain any undertaking by the official and creditors' assignees in bankruptcy of the petitioner to pay the balance which might be found due to the appellant on taxation.

Mr. Merrick had acted as solicitor for Mr. Joyce prior to his bankruptcy, and a considerable sum was due to him for solicitor and client costs, for which he held certain securities.

On the 7th June, 1910, the usual order to tax was made on the application of Mr. Joyce, such order containing the usual undertaking to pay the amount certified on taxation.

On the 29th July, 1910, Joyce was adjudicated a bankrupt.

The bill of costs came before Master Mathews for taxation during the long vacation, when the Master directed that the solicitors for the assignees should get notice of the entry of the taxation, should take out a copy of the bill of costs, and attend the taxation.

On the 15th March, 1911, on the *ex parte* application of Joyce's assignees, the Master of the Rolls made an order that the further proceedings in the matter should be carried on and prosecuted by Alfred G. Hollinshead and Henry A. Gerty (creditors' assignees) as petitioners in place of Joyce, in like manner as if the petitioner had not been adjudicated a bankrupt.

(1) Before THE LORD CHANCELLOR, PALLES, C.B., and HOLMES, L.J.



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On the 25th April, 1911, Mr. Merrick moved to set aside the order of the 15th March, 1911, on the ground that it contained no undertaking on the part of the assignees to pay any balance certified on taxation; or that the order should be amended by inserting such undertaking. This motion his Honor refused, and Mr. Merrick appealed.

*C. Murphy* (with him *Matheson, K.C.*), for the appellant:—

As Mr. Merrick intends to rely on his securities, and not to prove in the bankruptcy, it is the settled practice that the assignees will not be allowed to proceed with the taxation without giving the undertaking to pay. They are in the same position as the client: *Clarkson v. Parker* (1); *In re Elmslie & Co.* (2); *In re Battams and Hutchinson* (3): see observations of Kekewich, J., p. 703.

The Master of the Rolls apparently thought that the solicitor was endeavouring to obtain a preferential payment from the assignees.

[Palles, C.B.:—If the assignees sought to get the deeds, their proceeding would be in the nature of a redemption suit, and they would have to undertake to pay whatever would be found due.]

*Blood, K.C.*, for the assignees:—

In the cases cited, the assignees had applied or joined in the application to tax. Here the application was made by the client before his bankruptcy. There was no statement made in the Rolls Court that the solicitor would not prove.

In answer to the Court, C. Murphy undertook, on behalf of Mr. Merrick, not to prove in the bankruptcy matter.

The Court made the following order:—

“The appellant by his counsel undertaking not to proceed in the bankruptcy of the said petitioner, and the assignees, by their counsel, declining to give undertakings similar to the undertaking of the

(1) 7 Dowl. 87.

(2) L. R. 9 Eq. 72.

(3) [1897] 1 Ch. 699.

petitioner contained in the order of the 7th of June, 1910, It is ORDERED that the said order of the Right Honourable the Master of the Rolls, dated 25th April, 1911, do stand discharged; and in lieu thereof it is ordered that the said order of the Right Honourable the Master of the Rolls, of the 15th March, 1911, be set aside, and that the assignees pay to the appellant, the said E. E. Merrick, solicitor, his costs of the motion of the 25th April, 1911, in the Court below, and of this appeal when taxed."

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Solicitor for the appellant: *The appellant in person.*

Solicitors for the assignees: *Casey & Clay.*

W. G.

# BRIDGET FOLEY v. MICHAEL FOLEY (1).

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April 21.

*Husband and wife—Benefit conferred on husband by wife out of her own property—Transfer of wife's money into joint names of husband and wife—Intention—Evidence—Joint tenancy.*

A, who carried on business in a small shop and was possessed of £1200 in money, married B, a workman earning wages. According to evidence which the Court believed and acted upon, A, both before and after marriage, announced her intention, in the presence of B, of putting the £1200 in their joint names, to become the property of the survivor; and she did, in fact, a few days after the marriage, without any solicitation or pressure by B, lodge the money on deposit receipt in the joint names of A and B; and in answer to the question "Whose was the money to be?" she said in her evidence, "On both our names to work on it as husband and wife should." After the marriage B paid his wages to A, and the money on deposit receipt was drawn on from time to time as required for the shop or other expenses, the profits of the shop being lodged from time to time on deposit receipt in the names of A and B.

*Held*, that the money so lodged on deposit receipt was the joint property of A and B during their joint lives, and would become the absolute property of the survivor of them.

APPEAL by the defendant, Michael Foley, from the judgment of Barton, J., dated the 10th February, 1911, declaring the plaintiff, Bridget Foley, the beneficial owner of two sums of £12

(1) Before the LORD CHANCELLOR, and LORDS JUSTICES HOLMES and CHERRY.

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and £1200 respectively lodged on deposit receipt in the Bank of Ireland, Tralee, on the 3rd November, 1906, and the 13th December, 1906, in the sole name of the defendant Michael Foley, and that he was a trustee thereof for the plaintiff; and ordering him to endorse the said deposit receipts and concur in doing all other acts necessary to enable the plaintiff to obtain payment of the said moneys.

The parties to the action were husband and wife, having been married on the 27th September, 1903, both being then of mature age, with a disparity of about five years between them. For some years previously the plaintiff, Mrs. Foley, carried on the business of a provision dealer at Tralee, which she continued to do after the marriage, and she was possessed of a sum of £1200 cash, her own property, inherited from her mother. According to the view that the Court of Appeal took of the evidence, which in some points was directly conflicting, the plaintiff shortly before the marriage stated to a brother-in-law of the defendant, named John Smith, in the presence of the defendant, that she intended to give the money to the defendant. Smith said that would not be fair, and suggested that it should be put in their joint names and go to the survivor, to which she appeared to agree. This evidence was corroborated by the defendant, but contradicted by the plaintiff. After the marriage, according to the plaintiff's own evidence, she said to her husband that she would place her money in both their names. He said that it was all right. In cross-examination, in answer to the question, "Whose was the money to be?" she said, "On both our names to work on as husband and wife should." She went to the bank and placed the money, £1200, on deposit receipt in the joint names of herself and her husband. She never went to the bank after that, and her husband went there by her direction and got what money was required. The amount on deposit fluctuated from time to time, but was always standing in their joint names until, in order to avoid the importunity of her sisters, who were pressing her to lend them money, she told her husband to transfer the money into his own name, which he did and gave her the deposit receipt. Finally, after some drawings, the husband, by direction of the wife, relodged, in his own name, the £1200 balance of the deposit

account, and lodged also in his own name £12, money from the wife's business (being the sums to which the action related), and brought back the deposit receipts and gave them to his wife.

In August, 1907, the plaintiff and defendant, for reasons not disclosed, mutually agreed to separate and live apart. The defendant, though requested to do so by the plaintiff, refused to endorse the deposit receipts so as to enable her to obtain payment. The plaintiff, both in her statement of claim and her evidence at the trial, denied that she ever intended to make her husband a gift of the money, or told him that she would do so. In the statement of claim, the plaintiff alleged that the transfer into the joint names and finally into the sole name of the defendant was at his suggestion, to which she yielded. This was denied in the statement of defence. Before the marriage the defendant had been for many years in the employment of Donovan & Sons, Ltd, Tralee, at £1 a week, and he continued in the employment up to the time of action brought. Until the separation he paid his wages to the plaintiff, and they were used in her business. His name was over the shop front. There was no settlement or agreement for a settlement executed on the occasion of the marriage. The parties lived together amicably until the separation. The judgment of Barton, J., was in the terms of the 1st and 2nd paragraphs of the plaintiff's claim.

The statement of defence alleged *inter alia* (par. 2) that "prior to the said marriage, and on the treaty therefor, it was agreed between the plaintiff and the defendant that, upon the solemnization of the said marriage, the said deposit receipt should be transferred into the joint names of the plaintiff and the defendant, with the intention that same should become their joint property, and that in pursuance of the said arrangement a few days after the said marriage, viz., on the 13th October, 1903, the plaintiff, without any suggestion, pressure, or influence whatever, on the part of the defendant, transferred the said deposit receipt into the joint names of the plaintiff and defendant."

The defendant (par. 3) disclaimed any title to the entire of the moneys standing on the deposit receipt, and expressed his willingness to submit to a declaration that such moneys were held upon trust for the plaintiff and the defendant jointly, and stated

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that before action he had submitted to the plaintiff an offer to that effect, which she refused.

By counterclaim the defendant claimed a declaration that the moneys so standing on deposit receipts were the joint property of the plaintiff and defendant.

The plaintiff, in her reply, alleged that the agreement referred to in par. 2 of the defence was void under the Statute of Frauds.

At the trial before Barton, J., the plaintiff, defendant, and John Smith (described as Captain Smith), were examined and cross-examined at considerable length. The portions of the evidence which the Court of Appeal thought material, and acted on, are given in full in the Lord Chancellor's judgment.

*James O'Connor, K.C., and Carrigan, K.C. (with them Joseph K. O'Connor), for the appellant:—*

In the Court below the learned Judge dealt with the case as if it would depend upon whether or not there was a valid ante-nuptial contract which the Court would enforce. But that is not the way in which we present the case, nor was the evidence directed to establish a contract. We relied on the oral evidence, especially that of Captain Smith, as showing the wife's matured intention, even before the marriage, to make the transfer into the joint names of herself and her husband for their joint benefit, and for the benefit of whichever of them should survive. She might have changed her mind at any time before the actual transfer. She could not have been compelled by any Court to carry out that intention. But once the transfer was completed it became irrevocable, and the rights of the two parties could only be altered by the consent of both. The wife's own statements to her husband after the marriage, which she does not controvert, tend to confirm the view which we present: *Dyer v. Dyer* (1).

*P. D. Fleming, K.C., and The Hon. Cecil T. Atkinson, for the respondent:—*

The effect of placing the wife's money in the joint names was to constitute the husband a trustee for her. That was the

only intention of both parties. It might be different if the parties were strangers to one another, but this is a case between husband and wife; and the husband in order to succeed in his contention must show affirmatively that the wife intended to divest herself of her absolute property in her own money, by placing the money in their joint names. The onus lies on the husband to show that the property was changed. The conversation with Smith was a mere casual chat. It was to prevent reliance being placed on such oral statements that the Statute of Frauds was passed. There was no marriage settlement or marriage agreement, and, in the absence of settlement or agreement, it is inconceivable that the wife intended to part with her property. To establish such a gift, and to rebut the presumption of a resulting trust, clear evidence that the wife assented to the payment or transfer to her husband as a gift is necessary; in each case the onus lies on the husband to establish the gift. The question in such cases is whether a gift was intended or not: 1 *White and Tudor, L.C.*, 8th Ed. 730; *Green v. Carlill* (1); *Rich v. Cockell* (2); *Mercier v. Mercier* (3); *Re Curtis, Hawes v. Curtis* (4); *In re Flamank, Wood v. Cock* (5).

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#### THE LORD CHANCELLOR:—

We are all of opinion that the decision of Mr. Justice Barton cannot be supported, and that, instead thereof, the decree which I shall mention hereafter should be made. This is altogether a question of fact. It is not a question of presumption of advancement, nor whether there was a contract with regard to this money antecedent to the marriage, in its character binding and enforceable. I think Mr. Justice Barton took the view that the case of the defendant rested on the evidence of a valid antenuptial contract. Who was responsible for presenting that view of the case I cannot say. Mr. Atkinson disclaims all responsibility for it.

It is, no doubt, settled law that the onus lies on the husband to establish, as a matter of evidence to the satisfaction of the Court,

(1) 4 Ch. D. 882.

(4) 52 L. T. (N. S.) 244.

(2) 9 Ves. 369.

(5) 40 Ch. D. 461.

(3) [1903] 2 Ch. 98.

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that his wife paid this money into their joint names, in order that it should be their joint property, and should belong to the survivor; and, having regard to the ages of the parties, it is quite possible that the wife may be the survivor. The evidence of Captain Smith was not relied on as evidence of contract. That is not the way it was used by Mr. O'Connor in opening the appeal, but to support the gift by the wife which took place afterwards.

It appears that the parties were married in 1903, and Captain Smith, a relative of the husband, went to see the intended wife, and saw her in the presence of the intended husband; and these three persons who gave evidence as to what then occurred are all respectable people, and any discrepancy in their evidence must be attributed to lapse or imperfection of memory, and not to deliberate untruthfulness or desire to mislead the Court.

Smith says (291)—“She told me that she had money and house property, and she showed me her mother’s will and the leases of two houses. I read them over and said, ‘Well you are not starting without money any way.’ She said then that she was going to give the money to Michael; so I said that would not be fair, and that it should be put into their joint names, and let the longest liver have the blanket.” (292) “Did she agree to that? Yes, she appeared to consent.” (293) “Is that the only interview you had? Yes, on that subject.”

Mrs. Foley denies that there was anything said by her to Smith before the marriage about the money, but I think we are entitled to rely on the evidence of Smith. In cross-examination by Mr. Atkinson, he said (308) “Did you ask her what property she had? She told me without asking.” (309) “And that she was going to give all the money to Michael? Yes, those were the words.” (310) “Did she produce a deposit receipt? I did not see it.” (311) “Although she produced the leases? Yes.” (312) “You said it would be unfair to give all the money to Michael? Yes, and so it would.” (318) To Mr. Joseph O'Connor, “How much money did she say she had? About £1100.”

Accordingly it appears that the money was to be put into the joint names of husband and wife. She denies that anything of this kind took place, but she admits a conversation with her husband in Cork. (21) “He asked me would I give him half my

money. I waited a bit and then said, 'No. I would place it in both our names.' He said that was all right." (22) "Did you go to the bank and place the money in both your names? Yes." (23) "You endorsed the deposit receipts, one for £1150 and the other for £50? Yes." (24) "You then lodged it in both your names? Yes." She afterwards tells us what was intended by this transaction. (74) "Did he ask you for the money? Before he left I asked him for it, and he told me I was not to get it till he closed his eyes." That is inconsistent altogether with her case. Then she says in cross-examination (102) "In Cork defendant first mentioned about the money? Yes, he asked me would I give him half my money. I said 'No, but that I would go to the bank and place it in both our names.'" (103) "Were you very indignant at his suggestion? No. I just said I would put it in both our names." (104) "He agreed to that? Yes." (105) "Whose was the money to be? On both our names, to work on it as husband and wife should."

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That is only consistent with joint ownership—that the husband and wife should have the benefit of the money as joint owners. All the dealings are consistent with that. The fact that the money was afterwards transferred into the husband's sole name was to protect her from her sisters' importunity.

As to the pleadings in the case, she claims to be absolute owner of the money, and that the defendant, her husband, is a trustee thereof for her, and asks that he may be ordered to endorse the deposit receipt, and to do all other acts which may be necessary to obtain payment of the money to her from the bank.

The defence is, that upon the marriage it was agreed that the deposit receipt for £1200 should be transferred into the joint names of the plaintiff and defendant, with the intention that same should become their joint property, and that, in pursuance of the said arrangement, in a few days after the marriage this was done, without any suggestion, pressure, or influence by the defendant; and then there is a counter-claim, claiming a declaration that the moneys so standing on deposit receipt are the joint property of the plaintiff and the defendant.

On the counter-claim we are able to make the proper decree and declaration. We will reverse the judgment of Mr. Justice



*Appeal.*  
1911.

*FOLEY*  
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Chancellor.

Barton, and in lieu thereof declare that the two sums of £12 and £1200 lodged upon deposit receipt in the name of the defendant in the Bank of Ireland at Tralee, on the 3rd November, 1906, and 13th December, 1906, respectively, are the joint property of the plaintiff and the defendant during their joint lives, and will become the absolute property of the survivor of them, and that the plaintiff pay to the defendant his costs of the action up to and including the said judgment, and his costs of this appeal.

HOLMES and CHERRY, L.JJ., concurred.

The following is the curial part of the judgment of the Court of Appeal:—

“IT IS ORDERED that the judgment of the Chancery Division (the Hon. Mr. Justice Barton) be (and the same is hereby) reversed; and, in lieu thereof, the Court DOth ORDER that the sum of £12 and the sum of £1200, lodged upon deposit receipt in the name of the defendant Michael Foley in the Bank of Ireland, at Tralee, on the 3rd November, 1906, and 13th December, 1906, respectively, in the pleadings in this action mentioned, are the joint property of the plaintiff and of the said defendant Michael Foley during their joint lives, and will become the absolute property of the survivor of them. And the Court DOth ORDER that this action do stand dismissed, and that the plaintiff, Bridget Foley, do pay to the defendant, Michael Foley, his costs incurred in this action up to and including the said judgment, and his costs of this appeal when all said costs shall have been taxed by the Taxing Master.”

Solicitor for the plaintiff: *James M. Murphy.*

Solicitor for the defendant: *Henry Walsh.*

W. G.

## IN RE SALTER; REA v. CROZIER AND ANOTHER.

Barton, J.  
1911.

*Will—Gift—Charity—“Charitable or religious purposes”—Gift to bishop of diocese and incumbent of parish for time being—Discretion of trustees as to application of trust fund—Validity.* April 28, 29.

By his will a testator devised and bequeathed the residue of his property real and personal to W., the Bishop of Ossory, or other the bishop of that diocese for the time being, and F., the incumbent of the parish of Carlow, or other the incumbent of that parish for the time being, upon trust to pay the interest, dividends, or annual proceeds of his residuary estate to his three sisters, and the survivors and survivor of them for life, “and from and after the decease of such survivor in trust, to apply and dispose of such interest, dividends, or annual proceeds from time to time for the use of the Protestant Orphan Society of the county of Carlow, or for or towards the relief and benefit of such poor and necessitous Protestant widows and widowers resident in the county of Carlow, or to both of such objects or purposes, or to such other merely and purely charitable or religious purpose or purposes for the benefit of or advantage of members of the Church of Ireland, or other Protestant denomination within the said county of Carlow, in such shares and proportions, and in such manner, as my said trustees shall in their uncontrollable discretion think fit.”

*Held*, that the testator in the words “charitable or religious” had not shown an intention to enable the trustee to apply the gift to purposes religious but not charitable, and that the gift was a valid charitable gift.

*In re Davidson, Minty v. Bourne* (1), distinguished.

By his will, dated 19th September, 1894, William Salter, of Carlow, nominated the Right Rev. William Pakenham Walsh, Bishop of Ossory, Ferns, and Leighlin, or other the Bishop of that diocese, for the time being, and the Rev. John Finlay, incumbent of the parish of Carlow, in the diocese of Leighlin, or other the incumbent for the time being of that parish, to be the trustees of his will, and after bequeathing a legacy to his niece, Mrs. Mary Rea, of £1000, and directing payment of debts, &c., he devised and bequeathed to his trustees the residue of his property, real, freehold, and personal, “upon trust to realize such of my properties, including such debts as may be then due to me, as may be necessary for the payment of said legacy of one thousand pounds

(1) [1909] 1 Ch. 567.

*Barton, J.* and my said funeral and testamentary expenses, and at their  
1911. discretion either to allow the remainder of my said trust property  
REA to remain in their respective investments or to invest the same or  
v. any of them in or upon any of the securities or investments as  
CROZIER. are now, or then may be allowed to trustees, and to vary the said  
investments or securities for others of a like nature from time to  
time, and to pay the interest, dividends, or annual proceeds thereof  
to my sisters, Margaret Salter, Fanny Salter, and Ellen Cuddy,  
and the survivors of them, share and share alike, during their  
lives and to the survivor during her life, and from and after the  
death of such survivor in trust to pay, apply, and dispose of such  
interest, dividends, or annual proceeds from time to time, for the  
use of the Protestant Orphan Society of the county of Carlow, or  
for or towards the relief and benefit of such poor and necessitous  
Protestant widows and widowers, resident in the county of  
Carlow, or to both of such objects or purposes, or to such other  
merely and purely charitable or religious purpose or purposes for  
the benefit of, or advantage of, members of the Church of Ireland,  
or other Protestant denomination within the said county of Carlow,  
in such shares and proportions, and in such manner, as my said  
trustees shall in their uncontrollable discretion think fit."

The testator died 25th December, 1903; and, on 11th August, 1904, probate thereof was duly granted to the defendants.

The only sister of testator surviving at the date of the hearing of this application was Fanny Salter, who was in receipt of the income of the trust fund, which consisted of about £11,000 New Consols.

On 21st November, 1910, a summons was issued by the plaintiff, Mrs. Mary Rea, as personal representative of one of the next-of-kin of the testator William Salter, to have it declared "that the disposition made by the said William Salter, deceased, in the said will of his residuary estate after the life estates given to his sisters and the survivor of them fails, and is void and contrary to law," and for necessary inquiries as to next-of-kin and for administration of testator's personal estate so far as might be necessary.

*H. Wilson, K.C., and Pim, K.C. (with them, John Bartley),* *Barton, J.*  
for the plaintiff:— 1911.

There are three classes mentioned in the will, which are, or may be made, objects of the testator's bounty, and it is as regards the third class of gift, viz., "such other merely or purely charitable or religious purpose or purposes," that the question arises.

The issue is a narrow one and depends upon the meaning of "charitable or religious." We contend that in the gift the word "or" can only have a disjunctive meaning, and that in that event the trustees can apply the residue for purposes other than pure charitable purposes. If the word "or" has not a disjunctive meaning, the words "or religious" have no meaning and may be struck out. The testator has by these words given the trustees power to apply the trust fund for purposes which are religious and beneficial, but may not be charitable within the legal meaning of the word. The moment you find in a will that a testator distinguishes between charitable purposes and purposes that may or may not be charitable, then the rule of *Morice v. Bishop of Durham* (1) applies, and the whole gift fails as being void for uncertainty.

If the trustees are given the alternative of applying the subject-matter of the bequest to other than "charitable" purposes, the trust is not sustainable: Halsbury's "Laws of England, Charities," p. 146, Tudor on Charities (4th ed.), p. 88: *Macduff v. Macduff* (2). In *James v. Allen* (3), the Master of the Rolls says, "But the question is, What authority would this Court have to say that the property must not be applied to purposes, however so benevolent, unless they also come within the technical denomination of charitable purposes? If it might, consistently with the will, be applied to other than strictly charitable purposes, the trust is too indefinite for the Court to execute"; and see also *Williams v. Kershaw* (4); *Ellis v. Selby* (5); *Vezey v. Jameson* (6). Those are the older cases, but the law

REA  
v.  
CROZIER.

(1) 10 Ves. 522.

(2) [1896] 2 Ch. 451.

(3) 3 Mer. 17.

(4) 5 Cl. & Fin. 111.

(5) 1 Myl. & Cr. 286.

(6) 1 S. & St. 69.



*Barton, J.* has not altered: *Boyle v. Boyle* (1); *Cocks v. Manners* (2). *Arnott* 1911. *v. Arnott* (3) shows that a gift for "religious purposes" is one *prima facie* for religious purposes which are charitable, but in that *REA* *v.* case there was no word contained in the will in question importing a disjunctive signification, as there is in this case. Where a testator has himself made the distinction between "charitable" and "religious" societies or institutions, a Court cannot say that he only meant such religious societies, &c., as are legally charitable: see the observations of Farwell, L.J., in *In re Davidson, Minty v. Bourne* (4), and see the observations of Lord Halsbury in *Hunter v. Attorney-General* (5). *In re White, White v. White* (6), will be relied on by the other side, but it is distinguishable. No disjunctive word occurs in that case at all. There was (as in *Arnott's Case* (3)) simply a gift for religious purposes which are to be taken as *prima facie* charitable. In *In re Sinclair's Trusts* (7) the will contained very special words, and it is at least doubtful if the decision would now be followed.

*Right Hon. J. H. Campbell, K.C., M.P., and Battersby, K.C.*  
(with them *Hubert Hamilton*), for the trustees:—

The Court will endeavour to ascertain the intention of the testator, for the test is a subjective one: *Attorney-General v. Becher* (8); and where a general charitable purpose is expressed, the bequest will not fail because of the uncertainty of the object: *Morice v. Bishop of Durham* (9). Here the two named objects are clearly charitable, and the inference is irresistible that the testator was only influenced by a desire to benefit institutions which are both religious and charitable. He uses the words "such other," which refer back to the charitable religious objects already mentioned, both of which were charitable, and both of which were religious in the sense that he was providing for the "widows and the fatherless in their affliction." The persons nominated to distribute his bounty were the bishop and the dean of the diocese for

(1) Ir. Rep. 11 Eq. 433.

(2) L. R. 12 Eq. 574.

(3) [1906] 1 Ir. 127.

(4) [1909] 1 Ch. 567, at p. 572.

(5) [1899] A. C. 315.

(6) [1893] 2 Ch. 41.

(7) 13 L. R. Ir. 150.

(8) [1910] 2 Ir. Rep. 25

(9) 9 Ves. 399; 10 Ves. 522.

the time being, persons in succession holding a particular religious or charitable office, and that circumstance almost, of itself, goes sufficiently far to establish the fact that the whole gift is charitable.

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1911.  
*REA*  
*v.*  
*CROZIER.*

But it is said that the testator has himself differentiated between "charitable" and "religious." "Or" no doubt may be disjunctive, but it is not necessarily so, and is frequently read as "and." According to the Standard Dictionary "or" can be read, when necessary, as a conjunction meaning "otherwise," or it can be regarded as the equivalent of another specified name or phrase, as "a violin or fiddle," "a common or garden spade"; and "or" can be read "and" when from the context it appears that the word was incorrectly employed in the place of some other word: Theobald on Wills, p. 411. In this will the testator has used the word "or" again and again in one or other of these senses, such as "purpose or purposes," which clearly is not disjunctive. The Court is therefore not coerced into reading "or" disjunctively, and will not do so unless constrained by authority: *Hunter v. Attorney-General* (1) disposes of the decisions relied on by counsel for plaintiff on this point, because that case shows that those decisions are not based on the use of the word "or," but on the fact (as Lord Davey says, at p. 323 of the report) "that where charitable purposes are mixed up with other purposes of such a shadowy and indefinite nature that the Court cannot execute them . . . the whole gift fails for uncertainty"; and as against their authority there is the decision in *Wilkinson v. Lindgren* (2), in which a bequest to trustees for "the different institutions (which were already named and which were charitable) or to any other religious institution or purposes" as the trustees should think proper, was held a good charitable gift, and not void for uncertainty; and that case was followed in *White v. White* (3). In this country there has been a clear decision on the point: *Re Sinclair's Trusts* (4). The words there used were identical with those in the present will, and Sir A. Porter, M.R., held the gift to be a charitable one. That case has never been overruled or dissented from, and is a binding authority on this Court.

(1) [1899] App. Cas. 309.

(2) L. R. 5 Ch. 570.

(3) [1893] 2 Ch. 41.

(4) 13 L. R. 1r. 150.

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The practical question which the Court will ask itself is:—  
On a fair and natural construction of the words used are not the purposes charitable? The gift is for the benefit of the county Carlow and persons living in the county Carlow, that is, for the benefit of a particular defined district, and this fact is an element to be considered in aid of holding the gift good: *In re Allen, Hargreaves v. Taylor* (1); *Dolan v. Macdermot* (2); *Attorney-General v. Mayor and Corporation of Carlisle* (3); *Attorney-General v. Earl of Lonsdale* (4).

[Counsel also referred to *Re Lloyd; Greame v. Attorney-General* (5); *In re Douglas; Obert v. Barrow* (6); *Dunne v. Duignan* (7); *Townsend v. Carus* (8); *Nightingale v. Goulbourn* (9); *In re Garrard* (10).]

*The Solicitor-General (C. O'Connor, K.C.) and John Linehan for the Attorney-General:—*

*Prima facie* a gift for religious purposes is for charitable purposes, and the whole tenor of the will in this case supports the view that “religious purposes” here mean “charitable purposes.”

*T. Henry Maxwell*, for the Commissioners of Charitable Donations and Bequests.

BARTON, J.:—

Plaintiff's case was opened by Mr. Herbert Wilson, who with his usual concise relevancy and directness went straight to the only point in the case, namely, whether the word “or” in “or religious” is so disjunctive in its meaning and effect as to show an intention of enabling the trustees to apply the legacy to purposes religious but not charitable. He relied upon a sentence in the judgment of Farwell, L.J., in *In re Davidson* (11).

In *In re Davidson* (11) the words of the will were “charitable, religious, or other societies, institutions, persons, or objects.” The

(1) [1905] 2 Ch. 400.

(2) L. R. 5 Eq. 60; L. R. 3 Ch.

676.

(3) 2 Sim. 437.

(4) 1 Sim. 105.

(5) 10 T. L. R. 66.

(6) 35 Ch. Div. 472.

(7) [1908] 1 Ir. R. 228, 231.

(8) 3 Ha. 257.

(9) 2 Ph. Ch. 594.

(10) [1907] 1 Ch. 382.

(11) [1909] 1 Ch. 567, at p. 572.

words "societies" and "institutions" played some part in the judgment. The Court was of opinion that the gift comprised societies or institutions religious but not charitable. The words "*or other societies, &c.*," were also material, and were expressly relied on by Cozens-Hardy, M.R., who considered them sufficient to dispose of the case (see page 570 of the report). These words "*or other societies, &c.*," enabled the trustees, according to the express terms of the will, to apply the legacy to societies, institutions, persons, or objects, which were neither charitable nor religious. The words "or other" aided a disjunctive construction of the two previous adjectives by introducing the element of something different, additional, or alternative to what had been previously specified. It is true that Farwell, L.J., at p. 572, after concurring with the Master of the Rolls' judgment, used the following words:—"It appears to me that when the testator has himself distinguished between charitable and religious societies it is impossible for the Court to say that by religious societies he means only such as are charitable," &c. Farwell, L.J., does not mention the words "*or other societies, &c.*"; but he had, of course, present to his mind the whole context of the words which he was construing.

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CROZIER.

So far as the present will is concerned, we have the word "other" used referentially to former gifts which were all clearly charitable. The question frequently arises whether the word "or" is used disjunctively or not, and, if so, to what extent. In the present case it is contended that it is used so disjunctively as *per se* to deprive the word "religious" of its *prima facie* charitable meaning. I cannot go so far as that. I think it is used either conjunctively as a synonym for "and," or, perhaps, in the sense in which it sometimes occurs in conversation or *currente calamo*, and even in literature, not as a word of contrast, but rather as introducing a second adjective more or less equivalent, related, or synonymous.

The words "religious and charitable," "religious or charitable," have been used by other testators. Reference may be made to *Baker v. Sutton* (1), where the words were "such religious and charitable institutions and purposes as the trustees

(1) 1 Keen, 224.



*Barton, J.* should think fit." That case was over-ruled on another point, but I am not aware that the decision of the Master of the Rolls has ever been shaken, so far as he held that *Morice v. Bishop of Durham* (1) and *Williams v. Kershaw* (2) did not apply to the will before him. *In re White* (3) shows that a bequest for religious purposes is *prima facie* charitable. In *In re Lloyd; Greame v. Attorney-General* (4), Stirling, J., had to deal with the words "religious or charitable" in a codicil. He did not hold the "or" disjunctive in the way which is now suggested to me in the present case. He held, on the contrary, that these words made it clear that an ambiguous gift in the will was a charitable gift. He had no difficulty in applying *Baker v. Sutton* (5) and *In re White* (6). Then there is the Irish case of *In re Sinclair's Trusts* (7), where the words were "any charitable or religious purpose . . . whether public or private." The same argument was raised as is now presented to me, but the Master of the Rolls rejected it.

I am of opinion that the sentence quoted from the judgment of Farwell, L.J., in *In re Davidson* (8) does not apply to the particular words of this will. I hold this to be a valid charitable gift, and not to be one to which the principle of *Morice v. Bishop of Durham* (1) applies. The word "religious" is *prima facie* charitable, and it does not appear to me that the testator has in the words "charitable or religious" drawn such a contrast or distinction as would show an intention to enable the trustees to apply the gift to purposes religious but not charitable, or would deprive the word "religious" of its *prima facie* charitable meaning.

Solicitors for the plaintiff: *A. and L. Goodbody.*

Solicitor for the trustees of the will: *C. Thorp.*

Solicitor for the Attorney-General: *J. E. M'Dermott.*

Solicitor for the Commissioners of Charitable Donations and

Bequests: *John M. Maxwell.*

R. W. L.

(1) 10 Ves. 522.

(2) 5 Cl. & Fin. 111.

(3) [1903] 2 Ch. 41, 52.

(4) 10 T. L. R. 66.

(5) 1 Keen, 224.

(6) [1893] 2 Ch. 41.

(7) 13 L. R. Ir. 150.

(8) [1909] 1 Ch. 567, at p. 572.

IN RE BANDON ESTATES AND SETTLED LAND ACTS. *Barton, J.*  
1911.

*Land Purchase Acts—Superior interest—Head rent—Redemption price—* Mar. 14, 29.

*“Settled land”—“Land purchased by means of an advance”—Investment—Public trustee—Irish Land Act, 1909 (9 Edw. 7, c. 42), s. 38, sub-s. 1 (a).*

Head-rents, the subject-matter of a settlement, when redeemed under the Land Purchase Acts are “land purchased by means of an advance,” and the redemption-money of same may be invested by the trustees of the settlement with the sanction of the public trustee in the extended class of investments authorized by section 38, sub-s. 1 (a), of the Irish Land Act, 1909.

ORIGINATING SUMMONS.

By indenture of settlement, dated 19th June, 1876, executed upon the marriage of the Earl of Bandon, the plaintiff in the originating summons, part of the Bandon estates situate in the County of Cork were limited to uses under which the plaintiff was beneficially entitled in possession as tenant for life, with remainders over, and powers of sale and exchange were thereby given to the trustees thereof, but the settlement contained no provision as to the investment of moneys arising upon a sale.

Part of the lands comprised in the settlement had been sold under the Land Purchase Acts, some of these sales having been made by the plaintiff to his immediate tenants, and some by the owners of intermediate interests to the occupying tenants, the superior interests of the plaintiff being in the latter cases redeemed. A considerable portion of the purchase-money arising upon the sales by the plaintiff to his immediate tenants had been invested in the purchase of head-rents. Some of the lands out of which these head-rents issued were subsequently sold to the occupying tenants, whereupon the head-rents were redeemed. As a result of these dealings the trustees of the settlement had in their hands a considerable sum of money representing in part purchase-moneys of former sales invested in head-rents which had been redeemed,

*Barton, J.*  
1911.

*In re*  
**BANDON**  
**ESTATES.**

and in part the redemption-price of head-rents originally comprised in the settlement. The purchase-moneys arising from direct sales to his tenants had been, at the request of the plaintiff, invested in certain securities specified in section 38 (1) (a) of the Irish Land Act, 1909, with the sanction of the Public Trustee, and the plaintiff had requested the trustees to invest in the same way the remaining moneys representing the redemption-price of the head-rents, but the trustees had refused to do so unless protected by the order of the Court. The head-rents, the subject of the application, were ordinary head-rents payable to the plaintiff and did not include tithe-rent or other perpetual charges or annuities coming within the definition of "superior interests" in the Land Purchase Acts.

An originating summons was issued by the plaintiff making Richard Edmund Hodson and Arthur Wellesley Sandford the trustees of the settlement of 19th June, 1876, defendants, and it asked for a declaration (1) "That the trustees of the said settlement are bound to invest the moneys following, viz., (a) Purchase-moneys arising from sales under the Land Purchase Acts by the plaintiff to his tenants of portion of the lands comprised in said settlement, which moneys were invested in the purchase of head-rents, and are now represented by the redemption-prices thereof; and (b) the redemption-prices of other head-rents comprised in said settlement that had been redeemed on sales under the Land Purchase Acts, in such of the securities sanctioned by the Public Trustee under section 38 (1) (a) of the Irish Land Act, 1909, as the Earl of Bandon (the plaintiff) as tenant-for-life may from time to time direct; (2) In the alternative that said securities, when sanctioned by the Public Trustee, are permissible trustee investments for the two classes of moneys above-mentioned; (3) that the costs of the application as between solicitor and client be paid out of the property, subject to the said settlement."

*The Solicitor-General (Charles A. O'Connor, K.C.), and John Peart, for the plaintiff, the Earl of Bandon:—*

Head-rents, the subject-matter of a settlement, are clearly "settled land" within the definition in section 2 (3) of the Settled

Land Act, 1882. On a sale under the Land Purchase Acts, head-rents must be redeemed out of the advance. Redemption is equivalent to purchase, and the redemption-price is part of the purchase-money of "land purchased by means of an advance under the Land Purchase Acts." The trustees of the settlement may, therefore, on the request of the tenant-for-life, invest the redemption-prices of the head-rents in the manner provided by section 38, sub-section 1 (a), of the Irish Land Act, 1909.

*Barton, J.*  
1911.  
*In re*  
BANDON  
ESTATES.

*Cecil Darley*, for the trustees of the settlement :—

The section does not apply to head-rents or other superior interests redeemed out of purchase-money of lands sold : see *dictum* of *Ross, J.*, in *Prentice's Estate* (1).

BARTON, J. :—

The settlement of the Bandon estates comprises, besides tenanted lands, certain head-rents issuing out of estates of other landowners. These head-rents have been redeemed upon the sale, under the Land Purchase Acts, of the estates out of which they issued. The question for decision is, whether the redemption-moneys, which have been received in respect of these head-rents by the trustees, are subject to the powers of investment conferred by section 38 (1) (a) of the Irish Land Act of 1909. That question should, in my opinion, be answered in the affirmative. The material words of the section are as follows :—"Where any land purchased by means of an advance under the Land Purchase Acts is settled land within the meaning of the Settled Land Acts, 1882 to 1890, the trustees of the settlement may . . . invest the purchase-money, or any part thereof, in the following manner," &c.

The Settled Land Act of 1882 contains a definition of "settled land" in section 2 (3), and of "land" in section 2 (10) (1). Section 2 (3) provides that "land, and any estate or interest therein, which is the subject of a settlement, is for purposes of this Act settled land, and is, in relation to the settlement, referred to in this Act as the settled land." By section 2 (10) (1) "land" includes



*Barton, J.* incorporeal hereditaments. It follows from these provisions that  
 1911.  


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*In re*  
*BANDON*  
*ESTATES.*  
 head-rents, when comprised in a settlement, constitute settled land within the meaning of the Settled Land Acts. The only remaining question is, whether these head-rents have been “purchased by means of an advance under the Land Purchase Acts.” The tenant buys, by means of the advance, the vendor’s interest and all superior interests. The head-rent is, in effect, purchased by an advance under the Land Purchase Acts. It has been pointed out that the phrase “purchase-money” is, in the Irish Land Code, used as a synonym for the redemption-price of superior interests. For example, in section 16 of the Land Law (Ireland) Act, 1887, I find that the concluding words of the section run as follows:—  
 “And if such annuity, rentcharge, or rent is redeemed under this section, the *purchase-money* shall be dealt with as capital moneys arising under the said Act,” *i.e.* the Settled Land Act, 1882.

This construction of section 38 (1) of the Act of 1909 seems to be in accordance, not only with the language of the section, but also with its purpose and policy. What difference can it make, from the point of view of the vendor, or of the other parties interested under the settlement, whether the money, which comes by means of the advance under the Land Purchase Acts to the trustees of the settlement, is derived from tenanted lands or from head-rents? It is in substance and effect purchase-money which has to be invested.

Solicitor for the plaintiff, the Earl of Bandon : *Clifford Lloyd*.  
 Solicitors for the trustees : *Maunsell, Darley, & Orpen*.

R. W. L.

IN THE MATTER OF THE ESTATE OF GEORGE A. E.  
HICKSON.

Ross, J.  
1911.

Feb. 13.

*Land purchase—Bonus—Insolvent estate—Absolute order for sale—Dismissal of petition—Irish Land Act, 1903 (3 Edw. 7, c. 37), sect. 48 (4).*

Appeal.  
April 24.

An absolute order for the sale of an insolvent estate was made by the Land Judge on the owner's petition in the year 1887. In 1891, by an order of the Land Judge, the owner was given liberty to sell to the tenants through the Irish Land Commission, provided the incumbrancers did not object to such sales, the petitioner having carriage (*i.e.* the owner) undertaking to apply to have the petition dismissed so soon as vesting orders were made vesting the holdings in the tenants. The lands were sold to the tenants under the Irish Land Act, 1903, after the passing of that Act. The order dismissing the petition was not made until 1910.

*Held*, by Ross, J., that the order of 1891 was in effect a conditional order for the dismissal of the petition, that the order for sale was not in force at the date of the passing of the Irish Land Act, 1903, and that the bonus was therefore payable and should be added to the purchase-money.

*Held*, by the Court of Appeal, that the order for sale was in force up to the order dismissing the petition in 1910; that "so circumstanced" in the second branch of sub-section (4) of section 48 in the Irish Land Act, 1903, means "which is insolvent," and that accordingly in the present case no bonus was payable.

QUESTION arising on allocation.

In the year 1886 the owner of the estate for sale in this matter presented a petition in the Land Judge's Court for the sale of, amongst others, the lands sold in this matter. On 20th January, 1887, an absolute order for sale of the lands was made by the Land Judge. On 2nd June, 1891, an order was made by the Land Judge in the following terms:—"It is ordered by the Court that the owner in this matter be at liberty to carry out, through the Land Commission, the sales under the provisions of the Purchase of Land (Ireland) Acts, already agreed on, or hereafter to be agreed on, between said owner and tenants on the estate for sale in this matter, and that the guarantee deposits

*Ross, J.* in respect of such sales required by the Land Commission be retained out of the purchase-moneys, provided, however, that the  
 1911. incumbrancers on this estate shall not object in the Court of the  
*In re* Irish Land Commission to such sales being carried out, the  
 HICKSON'S solicitors having carriage of such sales in the Land Commission  
 ESTATE. Court undertaking to apply to have the petition for sale in this matter dismissed as regards any lands so sold, as soon as orders vesting their holdings in said tenants have been made by the said Land Commission."

On 16th June, 1910, the Land Judge made an order dismissing the petition as regards all the lands. The purchase-money of the lands was insufficient to pay the incumbrances thereon, and no part of the purchase-money of the estate would become payable to the owner. The vendor claimed to have the percentage on the purchase-money under section 48 of the Irish Land Act, 1903 (1), declared payable, and to have the same added to the purchase-money.

*Ronan, K.C., and Darley, for the vendor.*

*The Solicitor-General and J. Linehan, for the Treasury.*

Ross, J. :—

This is an application for the percentage payable out of the Land Purchase Aid Fund. The application depends mainly on the construction of an order of Mr. Justice Monroe. In the year 1886 a petition was presented by the owner in the Land Judge's Court for the sale of, amongst others, the lands sold in this matter, and in 1887 an absolute order for their sale was made.

Mr. Justice Monroe, by his order, dated 2nd June, 1891, directed that the owner should be at liberty to carry out, through the Land Commission, the sales under the provisions of the Purchase of Land (Ireland) Acts, already agreed on between

(1) Section 48 (4) of the Irish Land Act, 1903, is as follows:—"This section shall not apply to any estate sold by the Land Judge where the estate is so circumstanced that it would, independently of the Act of 1896, be sold without the consent of the owner as to price, or to any estate so circumstanced in respect of which an absolute order for sale by the Land Judge was in force at the date of the passing of this Act, or to any estate sold by a mortgagee in possession."

the owner and tenants on the estate for sale in the matter, provided that the incumbrancers should not object in the Court of the Land Commission to such sales being carried out, the solicitor having carriage of such sales undertaking to apply to have the petition for sale in the matter dismissed as regards any land so soon as the orders vesting the holdings in the tenants should be made. The holdings have been sold to and vested in the tenants under the provisions of the Land Act, 1903, and on 16th June, 1910, an order was made dismissing the petition for the sale of the lands.

*Ross, J.*  
1911.  
*In re*  
HICKSON'S  
ESTATE.

I have, in several cases, pointed out that the bonus is a stimulus given to owners of estates to induce them to sell to their tenants. In certain exceptional cases the bonus is not to be paid, among others, in the case of an estate where the owner, owing to incumbrances, has no interest in the estate, and is not, therefore, consulted as to the price, and in respect of which estate an absolute order for sale by the Land Judge was in force at the date of the passing of the Land Act, 1903.

There could, in 1891, have been no idea of an evasion of any provisions of an Act to be passed in 1903. Sales were, in 1891, being negotiated between the owner and the tenants. It was to the advantage of everyone to sell in the Land Commission. The order of Mr. Justice Monroe contemplates the owner having charge of the whole matter. It directs that when the sale should have been completed the solicitor having carriage should come back to the Court and have the petition dismissed. The order of 1891 is, in effect, a conditional order for the dismissal of the petition, and, on the fulfilment of the conditions, which fulfilment relates back to 1891, we must regard the absolute order for sale as being discharged in 1891. That being so, the absolute order for sale by the Land Judge was, at the date of the passing of the Land Act, 1903, not really in force at all. It could only be in force if the contemplated sale in the Land Commission failed, and it did not fail. Further, the circumstances of the sale contemplated the owner being consulted as to price. Consequently, the case does not come within the exceptions. I must, therefore, declare the bonus to be payable, and direct it to be added to the purchase-money.



*Appeal.*  
1911.

*In re*  
HICKSON'S  
ESTATE.

April 24.

The Treasury appealed (1).

*The Solicitor-General* (with him *J. Linehan*), for the appellants :—

No percentage is payable in respect of this estate which comes within the second branch of section 48 (4) of the Act of 1903. The estate was admittedly insolvent, and although the owner may have exerted himself in carrying through the negotiations with the tenants, which resulted in sales, he could not have prevented a sale at any price which the Land Judge in the interest of incumbrancers saw fit to accept. Therefore, if the sale had gone on in the Land Judge's Court the case would have come within the first limb of sub-section (4). But the absolute order for sale was plainly in existence until the dismissal of the petition on 16th June, 1910. The order of *Monroe, J.*, was one of a class commonly made at that time to enable the lands to be sold through the Land Commission, notwithstanding the pendency of a petition for sale in the Court of the Land Judge, who had not then power to sell to the tenants under the Land Purchase Acts. It was in no sense an order, conditional or otherwise, discharging the order for sale or dismissing the petition. It contemplated a further order for that purpose being applied for and made. "So circumstanced" in the second limb of the sub-section must be given the same meaning as these words have uniformly received in the first limb, namely, that the estate was insolvent, and, therefore, would have been sold without the consent of the owner as to price : *In re Barton's Estate* (2).

*Darley* (with him *Ronan, K.C.*), for the respondent :—

The sales having been actually carried out through the Land Commission Court, by means of advances under the Land Purchase Acts, the proceedings in the Land Judge's Court had virtually been abandoned before the Act of 1903 (3). So far from the owner not being consulted as to price, the sales were, in every instance, negotiated and carried through by the owner, with approbation of the Court and the incumbrancers. In every case his opinion as to

(1) In the Court of Appeal before THE LORD CHANCELLOR, and LORDS JUSTICES HOLMES and CHERRY.

(2) [1909] 1 I. R. 205 ; [1910] 1 I. R. 100.

(3) In answer to a question by the Court it was stated that all the sales took place after the passing of the Act of 1903.

the adequacy of the price was considered by them, and almost invariably adopted.

*Appeal.*  
1911.

*In re*  
HICKSON'S  
ESTATE.

THE LORD CHANCELLOR:—

I think this is a wholly insolvent estate. On one mortgage to the Representative Church Body, there are arrears of interest due, amounting to £18,000, and the principal and interest, as vouched, amounts to £47,260. This is only one of several large incumbrances on the estate, which has been sold through the Land Commission, the total purchase-money being £38,275. It is said that some of the mortgages affect other lands the property of the vendor; but taking them altogether, it is plainly the case of an insolvent estate. If the estate had been sold by the Land Judge, no bonus would have been payable, as section 48 of the Act of 1903 would have been excluded in that case by the first branch of sub-section (4). I think it is quite clear that the absolute order for sale, which was made on the 20th January, 1887, was in force at the date of the passing of the Irish Land Act, 1903. I cannot agree with the construction put by Mr. Justice Ross on the order of the 2nd June, 1891. It only gave leave to the owner to carry out the sales through the Land Commission, with an undertaking by the solicitor having carriage of those sales to apply to have the petition for sale dismissed as regards lands sold as soon as vesting orders should have been made. This order did not dismiss the petition for sale. That was not done until the order of the 16th June, 1910. Then how is sub-section (4) of sect. 48 to be construed? We think it plain that the words "so circumstanced" in the second branch must be given the same meaning as the same words in the first branch, that is to say, an insolvent estate. If the sales had taken place before the passing of the Act of 1903, possibly the result might have been different. But no sale was effected until after the passing of the Act of 1903, and, therefore, the order for sale was in existence when that Act passed. The order for sale was in full force until Mr. Justice Ross made the order of the 16th June, 1910, dismissing the petition.

LORDS JUSTICES HOLMES and CHERRY concurred.

Solicitors for the owner: *Maunsell, Darley, & Orpen.*

Solicitor for the Treasury: *W. G. Towers.*

W. G.

Barton, J.  
1911.

# EDINBURGH LIFE ASSURANCE COMPANY v. Y.

March 15. *Practice—Pleading—Fraud—Evidence—Res inter alios acta—Frauds in other cases as evidence of a systematic course of dealing—Proof of similar frauds—Opening statement of counsel—Order XIX, Rule 6.*

An action was brought by a Life Assurance Company against the defendant, claiming to have a policy of assurance set aside on the ground of fraud. There was no averment in the statement of claim that the alleged fraud was part of a fraudulent system, nor any allegation that defendant had been a party to any similar acts of fraud. At the trial it was proposed, without previous notice to the defendant, to adduce evidence connected with the effecting of other policies by the defendant under similar fraudulent circumstances as evidence of a system of fraud.

*Held*, that the evidence of the similar frauds would be admissible, if the substance of the allegation, that the fraud was part of a system, were stated in the statement of claim.

## TRIAL OF ACTION.

The plaintiffs were a Life Assurance Company, and claimed to have a policy of assurance effected with the company on the life of one Z., dated 30th January, 1902, set aside on the ground that the same was procured by the fraud of the defendant or Z., or both, or was a wagering policy contrary to the provisions of the 14 Geo. 3, c. 48, and 29 & 30 Vict. c. 48. They also claimed the repayment of £500, the amount of the policy paid to the defendant, with interest thereon.

The statement of claim set out that, in January, 1902, the defendant came to the company's local agent purporting to be acting on behalf of Z., to negotiate the effecting of a policy of assurance upon the life of Z. It stated that neither the company nor their agents had any previous knowledge of or dealings with Z., and that they relied on the introduction of the defendant, who represented Z. to be a well-to-do farmer, whereas he was only a farm labourer without any means of paying the premiums on a policy of assurance. Negotiations were entered into, and a proposal for a policy was sent in, and on the 30th January, 1902, the company issued a policy of assurance

upon the life of Z., and in his favour, for the sum of £500, payable at death, subject to the payment of the annual premium of £29 5s. 5d. The claim stated that the policy was issued and granted on the basis of the information contained in the said proposal; and it alleged that Z. never had any *bona fide* intention of effecting the policy for his own use and benefit, but merely allowed himself to be used as an instrument by the defendant for committing a fraud upon the company, and that the sole object of effecting the said policy was, that it might, by false and fraudulent representations, be issued at a lower premium than the ordinary rates of the company in such cases, and then be transferred to the defendant for his own use and benefit.

*Barton, J.*  
1911.  
EDINBURGH  
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Y.

It was alleged that general statements in the proposal for assurance were false in material respects and to the knowledge of the defendant.

It was also alleged that the policy was in fact effected by the defendant in the name and on the pretended behalf of Z., but in reality for defendant's own use and benefit, and that the defendant had no interest in the life of Z.

On the 30th July, 1903, plaintiffs received notice of an assignment of the policy to the defendant in consideration of £55 alleged to have been paid to Z. by defendant. The statement of claim alleged that such transfer (if executed) was not a *bona fide* one, and that there was no consideration for same, and that no interest passed, as said policy had been procured by fraud.

On the death of Z., on 16th March, 1906, the defendant claimed payment of £500, the amount of the policy of assurance, which the plaintiff company paid.

The plaintiffs submitted that the procuring of the policy and the subsequent dealing therewith was a gross fraud by the defendant and Z. upon the company, and that the whole transaction was a deliberate and concocted scheme for the purpose of defrauding the company.

There was no reference in the statement of claim to any other frauds, nor any allegation that the fraud was part of a system.

The defence traversed the material allegations of the statement of claim, and alleged that the assignment of the policy to defendant was valid and *bona fide*; that, if any fraudulent or untrue



*Barton, J.* statements had been made by Z. in the proposal for the policy, 1911. the same could have been discovered if plaintiffs had used due EDINBURGH and reasonable care. They alleged *laches* on the part of the LIFE ASSCE. plaintiffs; and further alleged that, if any fraud or misrepresentation was committed by Z. in reference to the procuring of the Co. policy of assurance, the defendant had no notice or knowledge of v. such, and took the assignment of the policy as a *bona fide* purchaser Y. for value.

The case came on for trial before Barton, J., on the 15th March, 1911.

*The Right Hon. J. H. Campbell, K.C.* (with him *Chaytor, K.C.*, and *E. A. Swayne*), in opening the case for the plaintiffs, stated that he would tender evidence on behalf of the plaintiffs to prove that the defendant had been guilty of acts of fraud, similar to that now alleged, which had been perpetrated by him in reference to the effecting of policies of assurance with the plaintiffs' company, and other companies, on the lives of other persons.

*Matheson, K.C.* (with him *Healy, K.C.*, and *Harbinson*), for the defendant, interposed and said he would object to the reception of such evidence on the ground that it was not admissible to prove the fraud in this case by fraudulent acts in other cases, and consequently such facts should not be stated by counsel in the opening statement of the case.

BARTON, J.:—

I have no doubt that evidence of similar acts of fraud may be receivable in a case of this kind. But I observe that there is no reference in the statement of claim to the allegation that the alleged fraud was part of a system. Will the evidence be admissible without some such averment? Is not the allegation that the alleged fraud was part of a system a material fact upon which plaintiff relies? If so, should it not be stated in the statement of claim? If counsel are willing and prepared to do so, it would, perhaps, be convenient to have the point argued at this stage, before it is too late to allow, if necessary, an amendment of the pleadings, upon whatever terms may be just.

*Campbell, K.C., and Chaytor, K.C., for the plaintiffs.*

*Barton, J.*

1911.

We say that any amendment in the claim is not only quite unnecessary, but would be improper as pleading evidence: see observations of Brett and Lindley, JJ., in *Blake v. Albion Life Assurance Company* (1). The cause of action is confined to Z.'s policy. We do not seek to set aside the other policies. Being confined to Z.'s policy, under Order XIX, Rule 6, we are only bound to set out in our pleadings particulars of the fraud in relation to that particular policy. This we have done in the most elaborate way. When we come to prove the fraud, we are entitled, upon the authorities, to give in evidence the circumstances in connexion with effecting other policies as evidence of a system of fraud: *Blake v. Albion Life Assurance Society* (1).

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A similar act of fraud does not fall within the rule of *res inter alios acta*, and we are not precluded from showing that the transaction concerning the policy now in question was one of a fraudulent class. See judgment of Lindley, J., in *Blake's Case* (1) at pp. 105 and 106 of report in 4 C. P. D. This decision was followed in *Barnes v. Merritt & Co.* (2).

The evidence of fraud in other similar cases is admissible. It is relevant to the question at issue: *Reg. v. Gray* (3); *Queen v. Rhodes* (4); *Rex v. Bond* (5); *The King v. Francis* (6). In *Rex v. Fisher* (7) evidence of the perpetration of other frauds by the defendant was held to be wrongly admitted in evidence against him, but only on the ground that such evidence did not show a systematic course of fraud, but merely that the defendant was of a general fraudulent disposition.

The other side do not base their objection on the form of the statement of claim. Their case is, that these other frauds cannot be gone into at all, and therefore the claim should not be amended.

As to taking defendant by surprise, we have set out in our affidavit of documents all the documentary evidence we intend to rely on in reference to other frauds.

*Matheson, K.C., for the defendant was not called on.*

(1) 45 L. J. (N. S.) C. P. 663;  
4 C. P. D. 94.

(2) 15 T. L. R. 419.

(3) 4 F. & F. 1102.

(4) [1899] 1 Q. B. 77.

(5) [1906] 2 K. B. 389, 403.

(6) L. R. 2 C. C. R. 128.

(7) [1910] 1 K. B. 149.

Barton, J.  
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BARTON, J.:—

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No objection has been taken to this point of Pleading and Evidence being, as a matter of convenience, argued and decided at this stage. The action is brought by a Life Assurance Company to have a policy cancelled for fraud. Counsel states, in opening, that he proposes to offer, on behalf of the plaintiff Company, evidence of other like frauds as proof that the defendant's fraud in this case was part of a system. Such evidence would be clearly admissible, if the substance of the allegation that the fraud was part of a system were stated in the statement of claim. It is a material fact in the chain of plaintiff's proof and should be pleaded. To do so would not be to plead evidence, but to state a material fact. It is the material fact which should be stated, but not the evidence by which it is to be proved. The defendant has had no notice of any such allegation, and he comes to the trial unprepared to meet it.

The authorities, when examined, seem to me to support this view. If the pleadings, evidence, and judgments in *Blake v. Albion Assurance Society*, as reported in 4 C. P. D. (1), be studied, it will be found that there was a sufficient allegation in the claim of the fraudulent system or course of conduct of which evidence was admitted in that case. It was alleged that an individual named Howard, who posed as an independent person, was in fact an agent of the Company who, for fraudulent purposes, assumed, and advertised under, a number of aliases. This was sufficiently alleged in the claim, as appears at p. 96. Lord Coleridge, at p. 107, pointed out that "the Judge at Nisi Prius *has to look at the claim* to see if the evidence is properly receivable in support of it." Again, at the bottom of p. 108, after outlining the alleged system of fraud, he said, "Now if that state of things could be shown, and *the substance of it stated in the claim*, it would be wasting words to declare it to be a gross and abominable fraud." The rest of the judgment, as well as the judgments of Grove, J., and Lindley, J., are consistent with this view, which it was not necessary in that case to emphasize.

The earlier case of *Blake v. Albion Life Assurance Society* (2),

(1) 4 C. P. D. 94.

(2) 45 L. J. (N. S.) C. P. 663.

which is reported in the *Law Journal* reports, was referred to by the Court at pp. 98, 99, and 111 of 4 C. P. D. in such guarded terms as to render it a case to be cited with caution, and in the light of those judicial observations.

The only other case in point is *Barnes v. Merritt and Co.* (1), in which A. L. Smith, L.J., rested his judgment upon the pleadings. His decision was to the effect that evidence of other cases of fraud was admissible upon the issues raised by the pleadings, in which systematic fraud had been sufficiently alleged. Rigby, L.J., said that he was of the same opinion.

It seems to me that the opposite view is contrary to natural justice. How can a defendant at the trial meet a charge of systematic fraud, unless he has had notice that it was alleged against him?

I recognize that the precise point has not been the subject of decision, and that the practice cannot be said to be settled. Subject to what I may hear from counsel, I am disposed to think that this is a case in which I should allow the plaintiffs to amend the statement of claim, if they are so advised, and to adjourn the trial, subject to terms as to costs, to a convenient date.

Solicitors for the plaintiffs: *Shean & Dickson.*

Solicitor for the defendant: *Edward O'Hagan.*

R. W. L.

*Barton, J.*  
1911.  
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Barton, J.  
1911.

BELL *v.* BUTTERLY.

June 2, 7, 20. *Practice—Costs—Administration action—Insolvent estate—Realization of assets—Separate account—Priority.*

In a creditor's administration suit, in which the general assets turned out to be insufficient to pay the costs of suit in full, the defendants, executors of deceased, claimed priority for their costs of suit, as against a secured creditor who had established a charge upon a fund which had been realized in connexion with a sale in another suit, and had been brought into Court and carried to a separate account.

*Held*, that they could only claim priority for such of their costs of suit as were relative to the separate account.

FURTHER CONSIDERATION.

By order of 28th July, 1905, two suits for the administration of the real and personal estate of Maurice Butterly, deceased, viz., Harriett Bell *v.* Butterly and Derham *v.* Butterly, the latter of which was a creditor's administration suit, were consolidated, and a decree for administration was made with the usual accounts and inquiries, and an inquiry for incumbrancers was directed. The executors and trustees of the will of Maurice Butterly, deceased, were among the defendants.

In pursuance of the decree, Joseph K. Bridgeman sent in a claim as secured creditor under a lost deed, dated 1st August, 1896. His claim was disputed by the unsecured creditors; and upon a memorandum, which was adjourned into Court, and then came before the Judge, it was, by order of 11th May, 1907, declared that the deed of 1st August, 1896, charged all the property of Maurice Butterly, deceased, situate in the City and County of Dublin, with the sum of £1000, and interest at 7 per cent., and that Joseph K. Bridgeman had priority over the unsecured creditors for that amount.

Several lots of land in the City and County of Dublin were sold under an order for sale in the suit, but the purchase-money

of these lots was insufficient to pay charges which had priority of *Barton, J.*  
Joseph K. Bridgeman. 1911.

A third action had been instituted by the Munster and Leinster Bank as mortgagees to realize a security held by the Bank upon certain property of Maurice Butterly, the deceased, in the course of which, under a decree dated 18th July, 1905, certain property of Maurice Butterly, deceased, situate in the City or County of Dublin, was ordered to be sold. It was considered advantageous to all parties to sell, together with this property, a small adjoining plot, part of the assets of Maurice Butterly, which did not form part of the Bank's security, and an agreement of sale of 16th August, 1906, was made to that effect. This arrangement was carried out by an order of the Vacation Judge, dated 4th September, 1906, entitled both in the suit of *The Munster and Leinster Bank v. Butterly*, and of the consolidated suit of *Bell v. Butterly and Others*, and it was ordered that the purchase-money of the small plot should be carried to a separate credit of "The estate of Maurice Butterly, deceased: *Harriett Bell v. John Butterly and Others*, and Separate Credit of purchase-money of plot marked red, and referred to in agreement for sale of 16th August, 1906." The amount carried to this separate credit was £63 10s. 1d., and the plot in question was situate in the City or County of Dublin.

By the Chief Clerk's certificate in the consolidated suit it was found that Joseph K. Bridgeman's charge was the only one affecting this sum of £63 10s. 1d., and that it was subject to his charge. Joseph K. Bridgeman was returned as a general creditor for £1,025 4s. 1d., with a statement that the debt was secured by the above charge.

From September, 1906, to June, 1911, the sum of £63 10s. 1d. remained standing to the separate credit to which it had been carried.

When the suit came on for further consideration in June, 1911, it was found that the general assets would be insufficient to pay the executors' costs of suit in full, and the executors claimed to be entitled to be paid their costs of suit out of the sum of £63 10s. 1d., in priority to Joseph K. Bridgeman's charge.

*Barton, J.*      *Devitt, for J. K. Bridgeman :—*

1911.

*BELL*  
*v.*

*BUTTERLY.*

The defendants are not entitled to be paid their costs out of this fund in priority to the mortgagee. Bridgeman always claimed as mortgagee, and never waived his security. *In re Cloghessy* (1) does not apply. This is the case of a mortgagee coming in and proving his claim in an administration of his mortgagor's estate; the rule is, in such a case, that the mortgagee is entitled to the whole of his security, if necessary to satisfy his debt, interest, and costs: *Mason v. Bogg* (2); *Pinchard v. Fellows* (3). In *Armstrong v. Storer* (4) the mortgagee had filed a bill of revivor, after the suit had abated, and he was held to have thereby adopted the administration proceedings, and the payment of his debt was postponed to the costs of administration. The fact that Bridgeman was put on proof of his mortgage should not be held to be an adoption of the suit: otherwise every mortgagee proving in an administration suit must be held to be adopting the proceedings; besides, the money in question was not realized in these proceedings, but was obtained through the sale by the Munster and Leinster Bank as mortgagees of lands of the deceased which turned out afterwards not to be included in their mortgage. The Chief Clerk has found that Bridgeman is the only incumbrancer on this fund, and it is submitted that the incumbrancer here comes under the third classification enumerated in the Vice-Chancellor's judgment in *Leonard v. Kellett* (5), and is entitled to this whole fund without any deduction for costs.

*Jefferson, K.C.* (with him *The Solicitor-General, K.C.*, and *James Henry*), for the defendants, the executors of *Maurice Butterly*, deceased:—

This being a creditor's action for administration, the defendants, being the executors of the deceased, are entitled to their costs in priority to Bridgman, although he is a secured creditor, inasmuch as he availed himself of this action to establish his right as a secured creditor, which was disputed by the plaintiff

(1) 21 L. R. I. 388.

(2) 2 My. & Cr. 443.

(3) L. R. 17 Eq. 421.

(4) 14 Beavan, 535.

(5) 27 L. R. I. 418, at p. 427.

representing simple contract creditors. Having established his position as a secured creditor, Bridgeman proceeded to prove his debt against the general assets. This brings him within the decision in *In re Cloghessy* (1)—a decision that has not been questioned. *Armstrong v. Storer* (2) is a case of the highest authority, and bears out this contention. That *Armstrong v. Storer* (2) is still law is plain from the judgment of the Vice-Chancellor in *Leonard v. Kellett* (3). The defendants as executors having to account have been involved in heavy costs. They were compelled to bring in and pass accounts which would not have been necessary in a mere mortgagee's suit; therefore this comes within the exception in favour of giving executors their costs which is referred to by the Vice-Chancellor in *Leonard v. Kellett* (3). This case is entirely distinguishable from *Hilliard v. Moriarty* (4) and *Ross v. Ross* (5). In both those cases the mortgagee valued his security, and was entitled to be paid in priority to the executors' costs. This case is also distinguishable from *M'Spadden v. Patterson* (6), inasmuch as there the chargeant proceeded in the first instance to raise the amount of the charge, but when the action came on for hearing at the request apparently of the defendant Patterson, the personal representative, the action was changed into an action for administration, and the Court of Appeal reversed the decision of the Master of the Rolls, who had given the personal representative his costs in priority to the mortgagee.

Barton, J.  
1911.  
BELL  
v.  
BUTTERLY.

*M'Cann, K.C.*, for the Munster & Leinster Bank, Limited.  
*Pringle* for other incumbancers.

BARTON, J. :—

June 20.

The special circumstances of this fund distinguish the case from those which have been cited. This fund does not represent the purchase-money of property sold under the general order for sale in the suit. The property was sold with property ordered to be sold in another suit of the Munster and Leinster Bank

(1) 21 L. R. I. 388.

(2) 14 Beav. 535.

(3) 27 L. R. I. 418, at p. 427.

(4) [1894] 1 I. R. 316.

(5) 29 L. R. I. 318.

(6) 5 N. I. J. R. 151.



*Barton, J. v. Butterly.* It was found advantageous to sell the plot together with other lands which were being sold in that suit. 1911. Accordingly an order was made on September 4th, 1906, entitled *BELL v. BUTTERLY.* in both suits, sanctioning that arrangement. This fund was then brought into Court, and carried to a separate credit with a special heading, and has remained standing to that separate credit since September, 1906.

The effect of carrying funds to a separate credit is dealt with in *In re Jervoise* (1), *In re Eyton* (2), and elsewhere. When carried to a separate credit, the fund is released from the general questions in the cause, and becomes marked as subject only to the questions arising upon the particular matter referred to in the heading of the account.

Under these circumstances, this fund should not, in my opinion, bear the executors' general costs of suit, in priority to the person who has established his charge upon the fund, but only such of their costs as were relative to the separate account, for example, their costs of the order of September 4th, 1906.

Solicitors for the executors : *Roger Green & Sons.*

Solicitors for J. K. Bridgeman : *Thomas F. O'Connell & Son.*

Solicitors for the Munster and Leinster Bank, Limited :

*Maxwell, Weldon, & Co.*

Solicitors for other incumbrancers : *Webb & Webb.*

W. M'G.

## IN THE MATTER OF THE ESTATE OF EDWARD L. MOSS.

Wylie, J.  
1911.

*Land Purchase Acts—Lands sold held under fee-farm grant—Tithe rent-charge payable by fee-farm grantee—Purchase-money insufficient to redeem fee-farm rent and tithe rentcharge—Priority—1 & 2 Vict. c. 109, s. 9.*

May 1, 4.

Where lands held under a fee-farm grant, and subject to tithe rentcharge payable by the fee-farm grantee, as owner of the first estate of inheritance or equivalent estate within the meaning of the Tithe Rentcharge Act, 1838, are sold by the fee-farm grantee under the Land Purchase Acts, the claim in respect of the fee-farm rent is entitled to be placed on the final schedule for payment in priority to that in respect of the tithe rentcharge.

*Irish Land Commission v. Annesley* ([1903] 1 Ir. R. 429; [1904] 1 Ir. R. 272) applied.

## OBJECTION to the final schedule of incumbrances.

The facts, as stated in the judgment of Wylie, J., were as follows:—The vendor held the lands sold in this matter under an indenture, dated the 28th December, 1855, by which a lease for lives renewable for ever, made in 1792, was converted into a fee-farm grant. The lands comprised in the lease were subject to a tithe rentcharge of £16 5s. 2d., payable to the Irish Land Commission, which had always been paid by the fee-farm grantee and his predecessors in title under the lease of 1792, as the owners of the first estate of inheritance or equivalent estate within the meaning of the Tithe Rentcharge Act, 1838. It appeared that the rents received by the vendor out of the lands were, prior to the sale, always sufficient to pay both the fee-farm rent and the tithe rentcharge, and, both being always paid, no question of priority arose.

The vendor sold the estate for £5,445. The redemption-price of the fee-farm rent had been fixed at £4,640, and of the tithe rentcharge at £372 11s. 5d., making together £5,012 11s. 5d., and if the sale had been carried through at once, the purchase-money would have been ample to pay the redemption-prices of both rent and rentcharge in full. Inasmuch, however, as the sale, having regard to the priority of the estate, could not be carried through for some

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years, the vendor had taken advantage of the provisions of the Act of 1909, and the regulations made thereunder, and had elected to take the entire purchase-money in  $2\frac{3}{4}$  per cent. Stock, the result being that instead of waiting for some years to get £5,445 cash, he had got at once £5,918 9s. 7d.  $2\frac{3}{4}$  per cent. Stock, which, at the price of the day, would only realize about £4,972, and this sum was not sufficient to discharge the redemption prices of both the rent and the rentcharge, and the arrears thereof. The question of priority of payment had, therefore, become material. The Examiner had placed the tithe rentcharge on the final schedule in priority to the fee-farm rent. The owners of the rent objected, claiming priority over the tithe rentcharge.

*W. S. Norwood*, for the owners of the fee-farm rent:—

The point is covered by the decision of the Court of Appeal in *Irish Land Commission v. Annesley* (1). At the date of sale the owners of the fee-farm rent were entitled to be paid their rent in priority to the tithe rentcharge. The respective claims were transferred to the purchase-money in the same priority.

*John Leech, K.C.*, for the Irish Land Commission:—

The effect of the decision in *Irish Land Commission v. Annesley* (1) is that so long as the lease for lives is subsisting the first estate of inheritance only is liable to tithe rentcharge. Where, however, the first estate of inheritance is determined, the fee-simple becomes liable. The Tithe Rentcharge Act, 1838 (1 & 2 Vict. c. 109), sect. 9, provides that in the event of the forfeiture, surrender, or other determination of the responsible estate, the party having the first estate of inheritance, or other equivalent estate or interest in remainder or reversion, shall become liable to the payment of such rentcharge; and further that in case of any such devolution of interest no more than the amount of one year's arrears of rentcharge shall be a charge on the lands subject to the payment of such annual rentcharge; and then section 27 makes the rentcharge have priority over all other charges affecting the lands chargeable therewith, and prescribes the mode of recovery.

(1) [1903] 1 Ir. R. 429; [1904] 1 Ir. R. 272.

Here the purchase-money represents the entire interests in the lands sold. The redemption-price of the head-rent—*i.e.* £4,640—represents the interest in the fee, subject to the fee-farm grant, as to duration, value, and charges affecting it. The grantee's interest in the lands is represented by the difference between the amount of the purchase-money, *i.e.*, £4,972 and £4,640, as to duration, value, and charges transferred to it, *i.e.*, £332. Once you exhaust the grantee's interest by payments on account of charges, the responsible estate is determined within the meaning of section 9, and the claim in respect of the tithe rentcharge becomes a charge on the purchase-money representing the interest above.

In *Saunderson v. Stoney* (1) and *Madden v. Wilson* (2) it was held that where a receiver was appointed on a summary petition under section 30 of the Act he was bound to pay the tithe rentcharge before any other charges, and even before the head-rent payable in respect of the responsible estate by the owner over whose land he had been appointed.

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In settling the final schedule in this case the Examiner, according to what I understand has been the usual practice, placed a tithe rentcharge in priority to a fee-farm rent, and the owners object to the schedule as settled, and claim priority over the tithe rentcharge. [His Lordship stated the facts as above set out and continued]—I have not been able to find any case, nor have counsel referred me to any case, in which this question has been decided or even discussed, though the priority of the fee-farm rent over the tithe rentcharge has, it seems to me, been fully discussed and clearly decided in *Irish Land Commission v. Annesley* (3). The full and clear judgment of Holmes, L.J., in that case leaves nothing further to be said on that question, and I simply take that case as finally deciding that, in a case like this, where a fee-farm grantee is the person liable to pay the tithe rentcharge under the Tithe Rentcharge Act, and the rents received by him from his under-tenants are not sufficient to pay both the fee-farm rent and

(1) 2 Ir. Eq. R. 153.

(2) 6 Ir. Jur. (O. S.), 129.

(3) [1903] 1 Ir. R. 429; [1904] 1 Ir. R. 272.



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the tithe rentcharge, the owner of the fee-farm rent is entitled to, and can, if proper steps are taken, enforce, payment of his rent in priority to the tithe rentcharge out of the rents of the occupying tenants, and is not himself liable to payment of the tithe rentcharge so long as the estate of the fee-farm grantee is undetermined.

Now, that being so, what is the effect of a sale by the fee-farm grantee, under the Land Purchase Acts, upon the then existing rights of the owners of the rent and rentcharge?

This question must, I think, depend entirely on the provisions of the Land Purchase Acts. It will only be necessary to refer to a few of those provisions.

Section 31 of the Act of 1896 provides that, where any land has been sold under the Land Purchase Acts, and an advance is made for the purpose of such sale, the sale of such land shall be made discharged from all superior interests, and the land shall be vested in the purchaser in fee-simple, and such superior interests, or the value thereof, shall become a lien upon, and be redeemed or satisfied out of, the purchase-money of such land.

Section 24 (1) of the Act of 1903 provides that, in case of the sale of an estate to persons other than the Land Commission, so soon as the holding or parcel of land comprised in the estate is vested in the purchaser, the Land Commission shall, in pursuance of sub-section (1) of section 14 of the Act of 1887, pay the purchase-money into the Bank of Ireland, and make an order attaching claims to the purchase-money, which shall be as effectual for that purpose as a vesting order made by the Land Commission vesting land in them.

Section 16 of the Act of 1903 provides that a vesting order made by the Land Commission vesting land in the Commission shall be effectual to vest it in fee-simple discharged (save as to certain specified rights) from the claims of all persons interested in the land, and all such claims shall, as from the date of the vesting order, cease as against the land and attach to the purchase-money in like manner as immediately before the date of the order they attached to the land.

Section 14 of the Act of 1887 provides that the Land Commission may pay the purchase-money into the Bank of Ireland, and may by order declare that the claims of all persons

who are interested in the land sold shall attach to the purchase-money of such land in like manner as immediately before the sale they attached to the land, and shall cease to be of any validity as against the land, and shall be discharged or redeemed out of the purchase-money, and the Land Commission shall determine the rights and priorities of the landlord and such other persons, and shall distribute the purchase-money in accordance with such rights and priorities.

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Then section 24 (6) of the Act of 1903 provides that the Land Commission shall, as soon as practicable, distribute the purchase-money to the persons entitled thereto whose claims upon that money have been ascertained, and for the purpose of such distribution may ascertain in the prescribed manner the amount or value of any such claim, and discharge, redeem, or satisfy the same out of said money.

Now, it seems to me that there cannot be any doubt as to the meaning or combined effect of the provisions I have referred to. The effect is plainly this, that, upon a sale being carried through and the lands vested in the purchasing tenants or in the Land Commission, all estates, interests, and claims, superior to the tenancy of the occupiers, which, at the date of sale, subsisted in or affected the land sold, cease to affect the land, and become transferred to the purchase-money, and attach to and become a lien upon it, to the same extent and in the same order of priority as they affected the land sold; and, as soon as the several claims have been ascertained in amount and order of priority, they are to be paid out of the purchase-money according to priority as far as the money will extend. Therefore, when any question as to the priority of payment of the amount of any claim out of the purchase-money arises, we have simply to ascertain what was its priority as it affected the land at the date of sale, and to place it in the same priority as against the purchase-money.

Now, at the date of sale in this case, the estate of the grantee under the fee-farm grant being a subsisting estate, and the estate liable to payment of the tithe rentcharge, the owner of the next superior estate was not, according to *Irish Land Commission v. Annesley* (1), in any way liable to the tithe rentcharge, and was

(1) [1903] 1 Ir. R. 429; [1904] 1 Ir. R. 272.

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entitled to have his rent paid in priority to the tithe rentcharge. And, therefore, it seems to me that he is entitled to the same priority in respect of his claim as against the purchase-money.

Mr. Leech, for the Land Commission, endeavoured to bring the case within section 9 of the Tithe Rentcharge Act, 1838, which provides that, in case of the forfeiture, surrender, or other determination of any estate, the owner of which is liable to the payment of the rentcharge, the person having the first estate of inheritance in remainder or reversion shall thereupon become liable. The contention of counsel was, as far as I could understand it, that, though the estate of the grantee was sold to the tenants, and was not determined by the sale, yet when the purchase-money was applied in payment of the redemption price of the rent, and fell short of paying the redemption price of the rentcharge, the estate of the grantee thereupon determined within the meaning of section 9, and the next superior estate thereupon became liable to pay the deficiency. It might as well be said that in *Irish Land Commission v. Annesley* (1) the estate of the fee-farm grantee had determined because the rent he received from his tenants was less than the rent reserved by the grant. Section 9 does not seem to me to touch this case, and I, therefore, allow the objection.

Solicitors for the owners of the fee-farm rent: *Corkner & Levis*.

Solicitor for the Irish Land Commission: *William Alexander*.

J. E. W.

(1) [1903] 1 Ir. R. 429; [1904] 1 Ir. R. 272.

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| THE SOCIETY OF THE GOVERNOR AND ASSISTANTS,<br>LONDON, OF THE NEW PLANTATION IN ULSTER<br>WITHIN THE REALM OF IRELAND, MARY<br>MOORE, FANNY E. CORSCADEN, EVA G. H.<br>McCORKELL, FREDERICK RITTER, JANE RITTER,<br>ALFRED MOORE MUNN, AND HIS MAJESTY'S<br>ATTORNEY-GENERAL FOR IRELAND (AT THE<br>RELATION OF THE AFORESAID PLAINTIFFS)<br>v. RICHARD M. FLEMING, EDWARD HAROLD,<br>PHILIP O'DOHERTY, EDWARD McDAID, JOHN<br>McCOLGAN, THOMAS REYNOLDS, JOHN BARR,<br>AND JOHN McDERMOTT. | <i>M. R.</i><br>1910.<br>Feb. 9-11,<br>14-16.<br>May 14.<br><hr/> <i>Appeal.</i><br>Nov. 23-25,<br>28, 29.<br><hr/> 1911.<br>Feb. 27. |
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(1909. No. 357.)

*Fishery Acts—Drift-net fishing for salmon—Public right of fishing in tidal and navigable channel—Nuisance to several fishery—Fixed net or engine—Damage caused by the acts of several persons, each independently engaged in doing what by itself is lawful.*

The Irish Society are entitled, under a charter of King Charles II., to a several fishery in Lough Foyle, which is approached from the open sea by two channels north and south of a sand bank. The north channel, which is about three-quarters of a mile wide, and outside the limits of the Society's fishery, has been for many years fished for salmon by drift-nets at night from the second week in June to the last week in July. Those nets are from 600 to 1000 yards in length, and 15 feet in depth; corks are attached to a light rope at the top, and leaden weights are suspended from the bottom of the net. Each net is worked by a boat to which it is attached by a rope. The nets are usually shot out at the last hour of the ebb-tide if it occurs at night, and at first hang in a perpendicular position across the part of the channel they occupy, but drift with the tide, until they are straight up and down channel, when they are boarded. Only two casts can be made of a night. So long as the net is straight across the channel or slantwise, the fish strike the net, push their head through the meshes, and get entangled by their gill covers. When many boats were working, they used to shoot alternately from either side of the channel, and the nets would overlap. Very large quantities of fish were taken by these nets. The number of nets varied from night to night



*M. R.* during the season. In that of 1908 the maximum was twenty-nine and  
 1910. the minimum six.

IRISH SOC. In an action by the Attorney-General, at the relation of the Society and  
 v. the lessees of their several fishery, for an injunction to restrain the drift-net  
 FLEMING fishing for salmon, the defendants relied on their right as members of the  
 AND OTHERS. public to capture as many salmon as they could by methods which were not  
 illegal.

*Held*, by Meredith, M.R., and by the Court of Appeal, affirming his judgment, that the method of fishing adopted by the defendants and others of the public was not a nuisance at Common Law; and that the nets used were not illegal as being "fixed nets" or "fixed engines" within the meaning of the Irish Fisheries Code.

The use of drift-nets for the capture of salmon in Ireland is legal. *The Duke of Atholl v. Glover Incorporation of Perth* ([1900] A. C. 403) does not apply to Ireland.

ACTION for an injunction. The Statement of Claim was as follows:—

1. By Letters Patent of King Charles the Second, bearing date the 10th day of April, 1662, duly enrolled, the first-mentioned plaintiffs were constituted and declared by the name of the Society of the Governor and Assistants, London, of the New Plantation in Ulster, within the realm of Ireland, one new body corporate with perpetual succession and a Common Seal. The said plaintiffs are hereinafter called "the Society."

2. By the said Letters Patent His said Majesty granted unto the Society and their successors certain rights of several fishery in Lough Foyle and in portions of the rivers Foyle and Bann respectively, and from the date thereof the Society have occupied and enjoyed the same by themselves and their tenants, and have received the rents and profits thereof until the present time, and the said Society became and were and still are seized in their demesne as of fee of the exclusive right of several fishery for salmon in the waters aforesaid.

3. By indenture of lease dated the 2nd day of January, 1894, and made between the said Society of the one part, and Robert Lyon Moore and others of the other part, certain rights of fishery in the waters aforesaid were demised unto the said lessees for the term of thirty-one years from the 29th day of September, 1888, and all the estate and interest of the said

lessees under the said lease prior to the grievances complained of passed to and became and now are vested in the above-named plaintiffs—Mary Moore, Fanny E. Corseaden, Eva G. H. M'Corkell, Frederick Ritter, Jane Ritter, and Alfred Moore Munn. The said plaintiffs are hereinafter called "the lessees."

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4. The lessees and their predecessors have expended large sums of money in erecting and maintaining hatcheries for the breeding and propagation of salmon in the said rivers and waters, and have otherwise expended and annually expend large sums of money for the protection and preservation of the said fish in the area of said fisheries, which are of very great value.

5. During the months of June and July, 1908, and for the purpose of taking to themselves the benefit and advantage of the said fisheries and of the expenditure of the Society and the lessees as aforesaid, and depriving the said plaintiffs thereof, the defendants combined together and have wrongfully and unlawfully resorted to sundry means and expedients for intercepting and capturing the salmon making for said lough and the rivers aforesaid, and have made use of certain nets at and near to the mouth of Lough Foyle, within the territorial waters of the realm both within and without the limits of a certain bay (now known as Magilligan Bay) being one of the King's Chambers situate within the counties Donegal and Londonderry, between Innishowen Head on the west and Ramore Head on the east, and outside the said bay to the northward and north-west thereof along the sea adjoining the coast of Donegal, and have thereby wrongfully deprived the said plaintiffs of large quantities of salmon, and greatly injured the fisheries aforesaid.

6. The defendants, their agents, and servants, have made use of the said nets at the times and places, and within the limits aforesaid, which said nets are of very great length and of considerable depth, and have extended and stretched the said nets across the portions of the said waters known to the defendants to be frequented by salmon making for the said lough and rivers, and have there kept the said nets stationary throughout the entire periods during which salmon are wont to make for the said rivers, and each such net used as aforesaid presents for its entire length a barrier and obstruction impassable by salmon,

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whereby large quantities of salmon have been obstructed and prevented from passing up the said lough or ascending the said rivers as they would otherwise have done; and the said Society and the lessees and others of His Majesty's subjects have been greatly injured, and damnified, and hindered, in the exercise of their lawful rights, and the plaintiffs submit that user of such nets as aforesaid is contrary to, and a nuisance at, the Common Law.

7. The defendants, their agents, and servants have made use of the said nets on the days and at the times and places and in the manner aforesaid, and on divers of the said occasions so placed and disposed their said nets that the same were stretched entirely across the entrance to the mouths of the said lough and rivers, and each of them and the same were rendered impassable, and were effectively blockaded against the passage of salmon, by reason whereof large numbers of salmon have been prevented from ascending the said lough and rivers, and the Society and the lessees and many others of His Majesty's subjects have been greatly injured and damnified, and hindered in the enjoyment of their property and the exercise of their lawful rights, and the plaintiffs submit that the user of the said nets as aforesaid is contrary to the provisions of the Fisheries (Ireland) Acts, and a nuisance at Common Law.

8. The defendants, their agents, and servants, have made use of the said nets on the days and at the times and places and in the manner aforesaid, being within inland or tidal waters, and the plaintiffs further say that the said nets when so used were fastened to the defendants' boats, and were kept stationary as aforesaid, and were fixed engines within the meaning of the Fisheries (Ireland) Acts not legally erected or used in the open season of 1862, and that the same were used contrary to the provisions of the said Acts.

9. The defendants, not being the owners of a several fishery within the meaning of the Fisheries (Ireland) Acts, made use of the said nets on the days and at the times aforesaid for taking salmon, within one half mile seaward or along the coast from the defined mouths of the said rivers, and each of them respectively, contrary to the provisions of the said Fisheries (Ireland) Acts.

10. The said nets used by the defendants as aforesaid are made and designed for the capture and taking of fish by enmeshing and entangling the same, and are so constructed that the fish taken thereby are greatly mutilated and their value seriously depreciated, and many fish escaping therefrom are grievously injured and maimed, and by the use of such nets the defendants have caused the death or destruction of large quantities of salmon not captured by them, and have permanently driven away large numbers of salmon which would otherwise have ascended the said lough and rivers, whereby the Society and the lessees and many other subjects of His present Majesty have been greatly injured, and damnified, and hindered in the enjoyment of their property and the exercise of their lawful rights, and the plaintiffs submit that the use of such nets within territorial waters is illegal, and a nuisance at Common Law.

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11. The said nets have been used by the defendants, their agents, and servants on the days and at the times and places and in the manner aforesaid, divers of the said occasions being within the weekly close seasons contrary to the provisions of the Fisheries (Ireland) Acts, whereby large quantities of salmon which would otherwise have ascended the said rivers to the said and other fisheries have been prevented from so doing by reason whereof the said fisheries have been greatly injured.

12. The nets used by the defendants as aforesaid are an obstruction to navigation, and a purpresture against the dignity of our Lord the King, and the plaintiffs submit that the same are illegal and a nuisance at Common Law (1).

13. By reason of the several matters aforesaid the value of the fisheries of the Society has been greatly reduced, and the property of the lessees therein has been injured, and the estate of the Society under the said lease and their interest in the rents thereby reserved have been prejudiced and jeopardized, and the fisheries in the said and other rivers are in danger of being wholly lost and destroyed by the extermination and destruction of the fish to the great hurt and injury of the Society and the lessees

(1) Paragraphs 7, 9, and 12 were abandoned at the hearing in the Court of Appeal.



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|--------------|----------------------------------------------------------------------|
| <i>M. R.</i> | and many other of His Majesty's lieges, and to the prejudice and     |
| 1910.        | damage of the commonwealth of the realm.                             |
| IRISH Soc.   | 14. The defendants and each of them have refused, and still          |
| v.           | refuse, to discontinue the practices aforesaid, and intend in future |
| FLEMING      | to repeat the acts complained of and every of them.                  |
| AND OTHERS.  |                                                                      |

The plaintiffs claimed :—

(a) That the said nets used as aforesaid may be declared an unlawful obstruction to the passage of salmon to the said lough and rivers, and a nuisance at Common Law to the Society, the lessees, and other subjects of His Majesty.

(b) That the said nets used as aforesaid may be declared to be fixed engines within the meaning of the Fisheries (Ireland) Acts.

(c) That the said nets used as aforesaid may on account of their construction and design be declared to be so destructive and injurious to fish that the use of the same is a nuisance at Common Law to the Society, the lessees, and other subjects of His Majesty.

(d) That it may be declared that the said nets used as aforesaid are an obstruction to navigation, and that such user is a purpresture against the dignity of our Lord the King.

(e) That it may be declared that the bay in paragraph 5, hereof mentioned, known as Magilligan Bay, was at all times and now is one of the King's Chambers, and that the territorial waters of the realm extend three miles seaward of a line drawn between the headlands in said paragraph mentioned.

(f) That the defendants, and each of them, and their and every of their agents, servants, and workmen, be perpetually restrained from using nets in such a manner as to unlawfully obstruct the passage of salmon or to be a nuisance to the Society, the lessees, or the other subjects of His Majesty, or to cause a purpresture as aforesaid within the territorial waters of the realm.

(g) That the defendants, and each of them, and their and each and every of their agents, servants, and workmen, may be restrained from using nets or other engines, of such design or construction, or of such a nature as to be a nuisance to the Society and the lessees or the other subjects of His Majesty within the territorial waters of the realm.

(*h*) That the defendants, and each of them, and their and each and every of their agents, servants, and workmen, may be restrained from using any net or other engine, at any time or place, or in any manner, contrary to the provisions of the Fisheries (Ireland) Acts, within the territorial waters of the realm.

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(*i*) The Society and the lessees claim that the defendants and each of them, and their and each and every of their agents, servants, and workmen, may be restrained perpetually from in anywise hindering or preventing or interfering with the Society, the lessees, or their assigns, or any other person lawfully claiming or to claim under the letters patent, in the exercise of their said exclusive right of fishing for salmon in the said limits.

(*j*) An inquiry as to damages and the payment of the sum found due.

The defendants, Edward Harold, Thomas Reynolds, John Barr, and John M'Dermott, delivered the following defence:—

1. These defendants admit the statements contained in the 1st, 2nd, and 3rd paragraphs of the statement of claim, but as to the true nature and effect of the Letters Patent and lease therein mentioned they beg leave to refer to same when produced.

2. These defendants deny the statements contained in the 4th paragraph of the statement of claim and each of them.

3. These defendants deny that they have combined together or with any other person or persons for any of the purposes mentioned in the 5th paragraph of the statement of claim, or that they have wrongfully or unlawfully or at all resorted to any means or expedients for intercepting or capturing salmon making for the said lough or rivers, or wrongfully or unlawfully or at all used nets at the places or for the purposes mentioned in the said paragraph.

4. These defendants deny that there is any place known as Magilligan Bay, or that the place referred to by that name in the 5th paragraph of the statement of claim is a King's Chamber, or that same is within the body of the counties of Donegal or Londonderry, or either of the said counties.

5. With reference to the statements contained in the 6th paragraph of the statement of claim these defendants deny that

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they or their servants or any of them have extended or stretched nets across the portions of said waters frequented, or known to these defendants to be frequented, by salmon making for said lough or rivers, or that they have kept said nets stationary, or that they have used any net in such a way as to present for its entire length a barrier or obstruction impassable by salmon, or that salmon have been thereby obstructed or prevented from passing up the said lough or ascending the said rivers.

6. These defendants deny that they or their agents or servants or any of them have done any act whereby the plaintiffs, or any of His Majesty's subjects, have been injured or damnified or hindered in their lawful rights, or used any nets in any manner contrary to, or so as to constitute a nuisance at, the common law.

7. These defendants deny that they or their agents or servants, or any of them, have so used, placed, or disposed nets that same were stretched entirely across the entrance to the mouths of the said lough or rivers, or any of them, or so that the mouths of the said lough and rivers, or any of them, were rendered impassable or blocked against the passage of salmon, or have thereby prevented salmon from ascending the said lough and rivers, or any of them.

8. These defendants deny that they or their servants or agents, or any of them, have done any acts whereby the plaintiffs or any of His Majesty's subjects have been injured or damnified or hindered in the enjoyment of their property or the exercise of their lawful rights, or used any nets in any manner contrary to the provisions of the Fisheries (Ireland) Acts, or so as to constitute a nuisance at common law.

9. These defendants deny that they or their agents or servants or any of them used any nets within inland or tidal waters, or that the nets used by them were fastened to their boats or were kept stationary, or that the said boats were kept stationary, or that the said nets were so used by them as to be fixed engines within the meaning of the Fisheries (Ireland) Acts, or were so used as to be contrary to the provisions of said Acts.

10. These defendants deny that they or their agents or servants or any of them used the said nets within one half mile seaward or along the coast from the defined mouths of the said rivers or any of them.

11. These defendants deny each and every of the statements and allegations contained in the 10th paragraph of the statement of claim.

12. These defendants deny that they or their agents or servants or any of them used the said nets or any of them on any occasion within the weekly close season contrary to the provisions of the Fisheries (Ireland) Acts, or so as to prevent salmon ascending the said rivers or any of them.

13. These defendants deny that any nets used by them or their agents or servants or any of them were so used as to be an obstruction to navigation, or a purpresture or a nuisance at common law.

14. These defendants deny each and every of the statements and allegations contained in the 13th paragraph of the statement of claim.

15. These defendants deny that the plaintiffs or any of them are entitled to maintain this action in respect of any of the matters mentioned in the 8th, 9th, 11th and 12th paragraphs of the statement of claim or any of them respectively.

16. These defendants say that the acts complained of in the statement of claim, and each of them respectively, were done by them in lawful exercise of the right of fishing in the sea to which these defendants in common with all other of His Majesty's subjects are entitled, and not otherwise.

17. In addition to relying on the foregoing defences, the defendant, Edward Harold, for himself, denies that he did the acts complained of in the statement of claim or any of such acts.

The defendants, Richard M. Fleming, Philip O'Doherty, Edward M'Daid, and John A. M'Colgan, also delivered a defence, but they subsequently gave a consent for judgment.

The plaintiffs delivered the following reply to the defence of the defendants, Edward Harold, Thomas Reynolds, John Barr, and John M'Dermott.

The plaintiffs say that:—

1. As to the defence of the above-mentioned defendants, they join issue.

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*M. R.* 2. As to paragraph 16 of the said defence, the plaintiffs further  
*1910.* say that the acts complained of were not, nor were any of them,  
*IRISH SOC.* lawful, and the plaintiffs deny that the defendants or any of them  
*v.* are entitled to fish with the nets, or in the manner, in the state-  
*FLEMING* ment of claim complained of, within the territorial waters of the  
*AND OTHERS.* realm, or at all.

3. The plaintiffs join issue with the defendant, Edward Harold, upon paragraph 17 of the said defence.

At the trial, before the Master of the Rolls, a large body of evidence, oral and documentary, was adduced. The title of the Irish Society and their lessees to a several fishery south-west of a line drawn from Greencastle, County Donegal, to Magilligan Point, County Londonderry, was expressly admitted (1); and it was also admitted that the fishing complained of was outside the limit of the several fishery, in a part of the sea where the public would be entitled to fish as of right in any legal manner. The place where the fishing was carried on was in the North Channel leading from the open sea into Lough Foyle, which is tidal and navigable up to the city of Derry, and which channel is situate between the County Donegal and a large sand bank called the Tuns Bank (1). The distance between Greencastle and Magilligan's Point is 1255 yards, and the average width of the North Channel is about three-quarters of a mile.

Much of the evidence was directed to show the diminution in the value of the Society's fishery during the years that drift-net fishing in the North Channel prevailed, the injury to fish as a saleable commodity by being meshed in the nets, and the quantity of fish which were alleged to be caught by the drift-nets; and elaborate tables were compiled, illustrating this evidence in a synoptical way. But the Master of the Rolls and the Court of

(1) See annexed map, which shows the locality. The arrows represent the nets fishing simultaneously on a particular night (30th June, 1908), those marked X being nets which either belonged to one of the defendants or were fished by one of them, or the fish caught by which were purchased by a defendant. The positions of the boats and nets on this map were delineated by Mr. Buchanan, C. E., who prepared it, from information given to him by Mr. John Patterson, who saw the fishing on that night. The average distance between the nets on that map would be 180 yards.

Appeal considered that the questions which arose were two only, namely, first, whether the mode of fishing in the North Channel by the defendants and other members of the public was a Common Law nuisance; and, secondly, whether drift-nets were legal or illegal in Ireland (1). There was not much dispute as to the mode of fishing actually practised by the defendants and others in the North Channel. It extended from the second week in June to the last week in July, and was exercised only at night. The number of boats employed necessarily varied, but according to the evidence of one of the principal witnesses for the plaintiffs, Mr. John Patterson, who was constantly watching the operations, twenty-nine was the maximum and six the minimum. The length of net used was variously estimated at from 600 to 1000 yards; they are about 15 feet in depth, and are made of fine twine, the mesh being  $2\frac{1}{2}$  inches from knot to knot. Corks are attached to a light rope at the top of each net, and lead weights are suspended from the bottom. There is a rope or line connecting the net with the boat. They commence shooting out the net at the last hour of the ebb. A quarter of an hour before low water the rate of the tide would be a quarter of a mile an hour. It takes about half an hour to shoot out the net, and about the same time to board it. When first in operation, the net is perpendicular. By the time the net is fully shot out it would have drifted ordinarily from a quarter of a mile to half a mile. They would then go about a mile before boarding the net. Two casts only can be made in a night, it not being possible to fish either in daylight or when the tide is at its full strength. A slack tide with a slight breeze was the most favourable condition. Four or five men manned each boat, and these were usually part owners of the boat and net. Each boat worked quite independently, and did the best for itself. When many boats were out, they fished from both sides of the channel, the nets overlapping as shown in the map. At the

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(1) There was evidence that licences for drift-nets were first issued in the Derry district in 1870; but that such nets had been used prior to that year without licences, and that within the last ten years there had been a large increase of salmon in the London market from this district, taken by drift-nets; that drift-nets were not used in Scotland since 1898; and that they were never used in England.

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hearing in the Court of Appeal it was practically admitted that the allegation in paragraph 5 of the statement of claim as to combination between the defendants could not be sustained. A considerable controversy, however, was raised in the evidence, and pressed throughout, as to the average time when a net would remain in a perpendicular position across the portion of the channel which it at first occupied. The defendants' witnesses, Kennedy and M'Kinney, both of whom fished in the North Channel, deposed that after being shot the nets would, within from a quarter to half an hour, drift straight up and down channel, become useless for fishing, and would be boarded. Kennedy said the net would be a very short time in the water till it was "right up and down." Ayton, a witness for the defendants, said that if he shot his net at the flood opposite Dunagree, the average strength of the current being then about two miles, he would probably find himself above the Warren Light before he got the whole of the net in.

Mr. Patterson, on the other hand, swore that fishing experimentally with a net of the description used by the defendants, the net remained in position for thirty minutes before there was any appreciable drift. Only one salmon, however, was caught on this occasion. On another experiment the net did not begin to drift for fifteen minutes, but caught no fish.

As to the quantity of salmon taken by the drift-nets of a night, Mr. Patterson stated in his evidence that on the 22nd June, 1908, there were twenty-seven boats fishing, and thirty-three salmon landed. On the 24th eleven boats were out, and twenty-nine fish were landed. On the 25th there were fourteen boats, but Patterson only saw three landing; they had nine salmon. On the 26th he saw nine boats land with seventy-five salmon. On the 2nd July there were twenty-one boats, of which he saw five land with forty-six salmon. On the 3rd there were fifteen boats, three of which landed twenty-eight salmon. On the 9th he saw six boats, which landed thirty-three salmon. On the 14th there were nineteen boats and sixty-five salmon landed. On the 16th seven boats and one hundred and ten salmon landed. On the 24th eight boats, of which the witness saw three land with twenty salmon. Most, if not all, the fish was taken to stores owned by the defendant,

Harold, and a person named Cavanagh, by whom they were consigned to the London market by the Great Northern and Midland Railways.

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Mr. Patterson deposed to several occasions during the season of 1908 when numerous boats were engaged fishing, but on which he did not see any of them landing. In fact, it may be taken as to this branch of the case that the defendants and others fished the North Channel by drift-nets in the manner described every night except Saturday and Sunday during the season, and caught a very large number of fish. From the consignment-books of the Great Northern and Midland Railways, it appeared that the nett weight of salmon consigned by the Great Northern from 11th June, 1908, to 13th August, 1908, was 20 tons 16 cwt., exclusive of the lessees' own consignments, but inclusive of fish caught otherwise than by drift-nets, which Mr. McDermott, manager of the lessees' fishery, estimated at 2 tons 5 cwt.; and by the Midland Railway during the same period was 62 tons 15 cwt. nett, from which should be deducted 13 tons 14 cwt., probable weight of fish caught otherwise than by drift-nets. Mr. McDermott further deposed that in 1908, between 17th June and 29th July, the defendant, Harold, consigned salmon from Moville and Clonmany of a nett weight of 12 tons 18 cwt. A return of the drift-licences issued in the Londonderry district since 1870, produced by Mr. McDermott from the licence-books, was given in evidence. It showed 23 licences issued in 1875, and 109 in 1908; also a return of the salmon taken by the plaintiffs during that period. It did not appear from these that the shortage in the fish taken by the plaintiffs was caused by the number of drift-nets in use. The suggestion of the defendants was that the good and bad seasons for salmon fishing run in cycles.

It appeared that on the 2nd January, 1907, the Department of Agriculture and Technical Instruction made and published a by-law prohibiting drift-net fishing within a mile oceanward of Greencastle; but, on appeal by twelve of the drift-net fishermen, the Privy Council refused to confirm the by-law.

*Ronan, K.C., D. S. Henry, K.C., and A. K. Overend,* for the plaintiffs other than the Attorney-General.



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 AND OTHERS. Master of the Rolls, and were in substance similar to those in the  
                   Court of Appeal.

May 4.

MEREDITH, M.R.:—

This case is one of the most important, as well as one of the most interesting, that it has been my lot to try.

In point of fact, I have delayed delivering judgment in the vain hope that I might be able to embody in my judgment some helpful remarks on the subject of the habits of salmon, on the great law of averages or law of compensation, and various other interesting topics that were so ably and so fully dealt with by the counsel on both sides who appeared before me. On calm reflection, however, I have come to the conclusion that the facts and the law of this case lie within a very narrow compass indeed, and that it would be waste of judicial power, waste of judicial energy, waste of public time, to attempt to define that which is undefinable—the habits of salmon—or to speculate on the reason why in particular years large numbers of salmon enter particular rivers, and in the next or following years the number is greatly diminished. The proposition advanced by Mr. Ronan in his opening argument is accepted by those who have knowledge on the subject, and there can be no doubt that salmon do return in large numbers to their native rivers; but, after reading much literature upon the subject, I have come to the conclusion that Mr. M'Dermott's evidence on the subject is worthy of consideration. In point of fact, you may mark considerable numbers of salmon, as they have been marked in the River Foyle, but the return you get in the way of statistics is not by any means satisfactory. One per cent. is not a basis upon which to found any very conclusive theory; and as regards this table which has been entered (table showing catch of salmon in the Irish Society's Fishery in the Foyle and Roe from 1875 till 1908), and which was very much discussed, and upon which theories were founded

and displaced—this table, purporting to show that according to the law of averages and the law of compensation the action of the defendants had destroyed, or would destroy, the plaintiffs' fishery, is, to my mind, as inconclusive as all such tables must, I think, inevitably be. No one, perhaps, except Emerson and his great disciple, Sir Robert Hart, believes more than I do in the great law of compensation; but it all depends upon where you start and where you finish, and, in my opinion, that table affords me no help in the circumstances of this case. Well, if I find myself unable to lay down any definite rules with regard to the habits of salmon, or to approach this case on the basis of some great injury to the plaintiffs' rights resulting from this table of averages that has been put in, on what principle am I to approach the question that I have to determine?

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Mr. Ronan based his case on two propositions. He rested his case upon this—and in the result he could do nothing else—in the first instance, that what the defendants had been doing was a nuisance at common law; and, in the second instance, that drift-nets, used as the nets in the present case were proved to be used, were “fixed nets” made stationary within the meaning of the Fishery Acts.

Now, as regards the common law rights, I certainly would be the last to suggest anything that would deprive litigants before me of their common law rights, but I cannot help thinking that some observations that I have made during the progress of the case were more or less in point. The Attorney-General is a party here at the relation of all the plaintiffs, and the Attorney-General can only be here for the purpose of asserting a public right, and as I understand, and as appears to me to be perfectly plain, the right which the Attorney-General, at the relation of the several plaintiffs, seeks to establish, is the right of access of salmon to their native waters. Well, Judges of far greater eminence than ever I could attain to have dealt with that subject. Whether you call it the right of the owner of a several fishery to have the waters from the sea unimpeded and not obstructed, or whether you call it the right of the fish—of the salmon itself—it practically comes to the same thing. But against all that is the immemorial right of the public to fish in public waters. There are here the

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two conflicting public rights; because, though the first may be in the interest of the individual owners of fisheries, it is still a public right in this way; and in all the cases that I have read it is treated as a right of the public to prevent other members of the public injuring the right of a public fishery. Therefore, when you talk of the owner of a several fishery asking to have members of the public enjoined from capturing salmon in an illegal way in the open sea or in tidal waters, your case is based upon this, that the action of individual members of the public is an infringement of the right of the public generally. The right of the public generally is to allow salmon to live. This case is only conversant with a salmon fishery. I leave out of sight the defendants who have consented to judgment. That is a matter for themselves. I have nothing whatsoever to say to that. I am not influenced in the smallest degree by what has been done in that way, and I desire to say nothing one way or the other as regards those defendants who have consented to judgment. But, as regards the defendants who have fought out this case, I say there has been no nuisance at common law. I am clear that drift-nets are lawful at common law, and that the fact that several members of the public have at one and the same time exercised their common law rights of fishing does not alter the matter one way or the other.

Now, Mr. Henry, in his reply for the plaintiffs, referred to several cases. He cited *Thorpe v. Brumfitt* (1). That case is so well known that I do not propose to either read the facts or the judgment, but only the part upon which Mr. Henry relied. In the head-note there are these words:—"The acts of several persons may together constitute a nuisance, which the Court will restrain, though the damage occasioned by the acts of any one, if taken alone, would be inappreciable." Let anyone read the observations of James, L.J., at page 656 of the report, and it will be plain to demonstration that the facts of that case, and the law of that case, have nothing whatsoever to say to the facts or the law applicable to the questions here. James, L.J., says:—"It was said that the plaintiff alleges an obstruction caused by several persons acting independently of each other, and does not show what share each had in causing it." He is dealing with a private right of way.

(1) L. R. 8 Ch. App. 650.

"It is probably impossible for a person in the plaintiff's position to show this. Nor do I think it necessary that he should show it. The amount of obstruction caused by any one of them might not, if it stood alone, be sufficient to give any ground of complaint, though the amount caused by them all may be a serious injury. Suppose one person leaves a wheelbarrow standing on a way, that may cause no appreciable inconvenience, but if a hundred do so, that may cause a serious inconvenience, which a person entitled to the use of the way has a right to prevent; and it is no defence to any one person among the hundred to say that what he does causes of itself no damage to the complainant. It is urged that no case is shown of Stead having done anything before the bill was filed; but this is no defence to a defendant who by his answer justifies what the others have done, and insists on the right to do the same. The defendants seem to have a notion that they have as much right to use the passage for the purpose of loading and unloading waggons as the plaintiff has to use it for the purpose of passing over it. But the practice of loading and unloading has arisen since the grant of the right of way, and has not been continued long enough to confer an easement." I refer to the case also cited by Mr. Henry, *Lambton v. Cox* (1): "The acts of two or more persons may, taken together, constitute such a nuisance that the Court will restrain all from doing the acts constituting the nuisance, although the annoyance occasioned by the act of any one of them, if taken alone, would not amount to a nuisance. The dictum of James, L.J., in *Thorpe v. Brumfitt* (2), approved of and followed." That is a very interesting case. It is the case of an organ-grinder, or a number of organ-grinders; and Chitty, L.J., followed what I would call the decision, but what he called the dictum, of James, L.J. He said, in words which will appeal to "the man in the house" rather than to "the man in the street":—"Each of the men is making a noise, and each is adding his quantum, until the whole constitutes a nuisance."

Well, I think I may say I agree in both these cases, and I thoroughly appreciate the reasons for the decisions in them; but they do not affect this case. The right at common law of the owner of a several fishery, no matter how acquired, whether by

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(1) [1894] 3 Ch. 163.

(2) L. R. 8 Ch. App. 650.



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Letters Patent from King Charles II., or how otherwise, outside the limits of his grant must be measured and controlled by the reasonable rights of the public. And this is the first case in my experience, and it is the first case which I have found in the books, in which the owners of a several fishery have attempted to dictate to the public as to the rights of the public outside and far beyond the limits of the several fishery as defined in the Letters Patent themselves, and as defined in the Inquisition. The point of junction of the public and private rights was agreed to and accepted by all parties, including the Attorney-General.

There is no question of title involved, good, bad, or indifferent. The plaintiffs, other than the Attorney-General, have established their rights to the exclusive fishery granted to them by Letters Patent under the Great Seal in the reign of King Charles the Second. In the year 1856 the title of the Irish Society, or rather of the lessees of the Irish Society, was challenged, but in the case of *Allen v. Donnelly* (1) their title was conclusively established; and although the Lord Chancellor of the day (Right Hon. Maziere Brady), at the conclusion of the first argument of the case, said (2), "The petitioners' title is to some extent what the common law called the odious monopoly, and it seems doubtful whether this Court"—that is, the great Court of Equity—"would ever intervene to maintain it," the same Lord Chancellor ultimately granted an injunction in the strongest form for the purpose of protecting the rights which had been ascertained by the verdict of the jury. Well, the limits, as I say, have been ascertained and defined; and, within the limits of the Letters Patent, the Irish Society are unassailed and unassailable since 1856, but outside those limits they must be subject to the ordinary rules of law, and, in my opinion, they have no right at common law to compel the defendants to desist from drift-net fishing.

It might appear from the evidence that drift-net fishing was known for the first time in the year 1870. I desire to say as little as possible in regard to matters which are not expressly developed in the evidence; but I do not take the view of the evidence that drift-net fishing in this country was unknown prior

(1) 5 Ir. Ch. R. 229, 452.

(2) Page 233.

to 1870, when the first drift-net licence was issued. Mr. McDermott, in his evidence, was asked—"Q. At the time you first knew the district in 1866 was there such a thing at all as a licensed drift-net, or a drift-net at all?" A. "Not a licensed drift-net, but there were poaching drift-nets." Q. "Have you got the licence-books of the Londonderry district since 1865?" A. "I have." Q. "You have them in Court?" A. "I have." Q. "When was the first drift-net licence issued?" A. "In the year 1870." The answer to the first question is rather peculiar—"Not a licensed drift-net, but there were poaching nets." I never like to say that anything is absurd, but, to my mind, the suggestion that a drift-net *per se* is illegal at common law is out of the question, although I think that a drift-net, or any other net, or engine, or device, may, no matter how harmless in its original construction, be rendered what has been called in the cases an obstruction to the free passage of salmon.

Having most carefully considered the evidence in this case in the light, if I may say so, of the able cross-examination of the witnesses by Mr. Gordon and Mr. Sullivan, I have come to the conclusion that the evidence on behalf of the plaintiffs was sadly exaggerated, that the experiments made by Mr. McDermott were experiments that were made with the view of bringing this case within the Scotch decision, and were not fair experiments, and that, on the true facts as elicited in this case, the Scotch case, and the decision in the Scotch case, have really no application. I thought at one time that this was a case in which the fishermen shot their nets during the short period between low tide and flood. Though I do not pause to read the evidence, the result is that during the hours and the days that the public are at liberty to fish, excluding the close time and the weekly close season, the user of these nets is not dependent upon the state of the tide at all, but dependent upon the hours of what I may call daylight and darkness. Without overloading the case, I want to read one passage from Mr. McDermott's evidence in reference to that. Having described his own experiments at low tide, the time in which you would expect, if he was correct in his deductions, he would make a magnificent haul, with 760 yards of net, worked from a boat with five men in it, and worked, according as he

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*M. R.* thought, in the worst possible way for the fish, he caught one  
 1910. salmon. That was the result. His second experiment resulted  
 IRISH SOC. in nothing, but when he was asked as to what the defendants did,  
 v. and how they fished, he said the net was paid out from the boats  
 FLEMING across the tide-way.—*Q.* “When the net is fully stretched out,  
 AND OTHERS. what is done with the rope at the end of the net?” *A.* “There  
 is a short bit of rope 20 or 30 yards long. That is made fast to  
 the net and attached to the boat.” *Q.* “Is there a space then of  
 about 20 yards between the boat and the end of the net?”  
*A.* “About that.” *Q.* “Is that used for moving the net or  
 merely to attach the net to the boat?” *A.* To keep control of  
 the net—they might lose the net altogether.” *Q.* “You said it  
 was in the dark?” *A.* “Yes.” *Q.* “Except for keeping control,  
 so as not to lose the net, do the men interfere in any way with  
 the net afterwards, except to take out the salmon?” *A.* “No  
 other way that ever I saw.” *Q.* Does the boat ride to the net as  
 it is called?” *A.* “Yes.” *Q.* “Have you yourself fished these  
 drift-nets?” *A.* “I experimented with them—I never fished  
 with them as a trade.” *Q.* “After the net is shot, and riding  
 as you have described to the boat, describe how it operates.”  
*A.* “The net remains in the water in this perpendicular form, the  
 leads are down and the corks are up, and it remains floating in the  
 water, and the fish coming up strike against the net.” *Q.* “When  
 it is shot at low or high water, is the net stationary?”  
*A.* “Absolutely stationary at low and high water?” *Q.* “Have  
 you yourself shot one of these nets at low water?” *A.* “I have.”  
*Q.* “Did you make that experiment with a drift-net on more than  
 one occasion?” *A.* “I did.” I have not said anything, and I  
 will not say anything, against Mr. McDermott. He was the  
 trusted adviser of the plaintiffs, the lessees of the Irish Society,  
 but I have said that I think his tests were unfair, and I do say  
 that his evidence, as will be seen by anyone reading it, was based  
 upon this low-water fishing. Whilst admirable in itself, it was  
 not exactly the evidence that could assist me, seeing he is asked—  
*Q.* “At what state of the tide do they shoot the net?” *A.* “They  
 shoot the net when it is dark at all states of the tide.” Counsel,  
 who was examining him, was rather surprised, and he asked—  
*Q.* “At all states?” *A.* “Yes.” *Q.* “What is the best time?”

A. "The best time is low water." I must say I was under the impression that the defendants were in some marvellous way able to have low water all the week round, until Mr. Sullivan directed my attention to almanacs and other documents, which convinced me—and the evidence is perfectly clear—that these fishermen, during the periods of following their vocation, did not select the time of low water to commence shooting their nets, but started about 8.30 or 9.30 p.m., according as the darkness sets in, and fished until about 1.30 a.m. Now, there is a paragraph in the statement of claim that I only allude to in passing, which charges—"The defendants combined together and have wrongfully and unlawfully resorted to sundry means and expedients for intercepting and capturing the salmon." Mr. Ronan said in opening, and Mr. Henry repeated in closing, the case for the plaintiffs, that there was no suggestion of an illegal conspiracy or combination. There is not a particle of evidence, in any case, in sustainment of such a suggestion. I merely desire to say that there is nothing suggested in the shape of a conspiracy to injure the plaintiffs. Whether they be the Irish Society, or the lessees of the Irish Society, there is no evidence of any combination at all which would give the plaintiffs a right in this Court, or in a Court of common law, to successfully proceed against the defendants. I have already dealt with the cases referred to by Mr. Henry, and I merely mention that matter to show that neither Mr. Henry, Mr. Ronan, nor I myself, overlooked it.

But, after all, I must come in the end to the real difficulty in the case, that is, the difficulty occasioned by the Fishery Statutes. I confess I have been much exercised in mind owing to the arguments of Mr. Ronan and Mr. Henry. More than that, I have been exercised in mind by three cases that were referred to, and which certainly call for consideration. I do not propose to either edit or write a new edition of Conner on the Fishery Acts, and therefore I take the leading sections to see how far Mr. Ronan's main proposition is compatible with the legislation on the subject and the decided cases. Fixed nets "made stationary" in section 1 of 13 & 14 Vict. c. 88, is to be read in connexion with section 4 of 26 & 27 Vict. c. 114, made applicable to the Act by section 44. Now, 13 & 14 Vict. c. 88, is "An Act to amend the law relating

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to engines used in the rivers and on the sea-coasts of Ireland for the taking of fish." In section 1, the definition section—"The word 'net' shall mean and include all descriptions of tackle, trawl, trammel, stake, bag, coghill, eel, haul, draft, and seine nets, and all other engines or devices, of whatsoever construction or materials, or howsoever known or styled, which shall be used for the like purposes as those in this Act or in the said recited Acts referred to." And then come the words—"And the words 'fixed nets' or 'fixed engine' shall extend to and include weirs, stake, bag, stop, and still nets, and all other engines or devices used for the like purposes, of whatsoever construction or materials the same may be, or however known or styled, and whether fixed to the soil or held by hand, or made stationary in any other way." I pass now to section 4 of 26 & 27 Vict. c. 114—"No fixed net that was not legally erected for catching salmon or trout during the open season of one thousand eight hundred and sixty-two shall be placed or used for catching salmon or trout in any inland or tidal waters." But then follow the words—"Any net placed or used in contravention of this section shall be deemed to be a common nuisance, and may be taken possession of or destroyed; and any net so placed or used, and any salmon taken by such net, shall be forfeited; and, in addition thereto, the owner of a net placed or used in contravention of this section shall, for each day of so placing or using the same, incur a penalty of not less than five pounds and not exceeding twenty pounds." Now, the Act of 26 & 27 Vict. c. 114, that I have been reading (section 4) was passed in the year 1863; licences for drift-nets have been issued at the rate of £3 a-piece to simple-minded fishermen and others since 1870 in this very district; and until this suit was instituted no living being suggested that drift-nets came within section 4 of that Act of 1863 in this country of Ireland; and may I further point out that applications have been made to the Privy Council, not merely in respect to drift-nets in inland or tidal waters, and bye-laws approved of by the Privy Council in reference to those very drift-nets, but that in relation to this identical fishery, and in relation to the identical waters in which the defendants carry on their operations, the Privy Council, who advised the Lord Lieutenant to pass the by-law in respect

of drift-nets in one place, refused to sanction a by-law limiting the sphere of operations of drift-nets in the channel or channels approaching Lough Foyle? Far be it from me to question the wisdom or the reasons for the decision (so far as these reasons are known) of the Privy Council in reference to that matter. For myself, speaking as a mere human being, I do think it would be better for the fish, and for the consumer of the fish, if they were caught in a less painful fashion. After all, I cannot say whether the struggles of the salmon in a draft-net, or one of the legalized instruments, are less painful than the struggles in a drift-net; but what I do know is that from 1870 down to the time this action was launched no one, so far as I know, contended that the use of these drift-nets, even in inland or tidal waters, was objectionable. And the matter has gone before the Privy Council on the basis that drift-nets in these very waters were legal engines, legal nets, and the Privy Council has refused to take, or has not taken, the view that these nets were destructive, or that the operations of the fishermen were destructive, of the plaintiffs' rights.

But the case of the defendants does not rest merely upon the question of acquiescence or law's delay. The argument of Mr. Gordon, and the argument of Mr. Sullivan, go much further than that, and Mr. Gordon has called attention to the schedule to the Act of 11 & 12 Vict. c. 92. I confess that it appears to me impossible, having regard to that statute and schedule, to hold that drift-nets are public nuisances within the meaning of the statute of 26 & 27 Vict. c. 114. What is the title of the Act?—"An Act for the protection and improvement of the salmon, trout, and other inland fisheries of Ireland." "Schedule to which the foregoing Act refers—Scale of licence-duties for each engine, net, instrument, or device used in salmon, trout, pollen, or eel fisheries in districts. Single salmon rods, £1; cross-lines and rods, £2; snap-nets, £1 10s.; draft-nets or seines, £3; drift-nets, £3." Then there are various other provisions made, and, curiously enough, by section 26 of the 26 & 27 Vict. c. 114, the duties Nos. 9, 10, 11, 12, and 13 in the schedule to 11 & 12 Vict. c. 92, are repealed, and other duties are substituted. What are they?—Bag-nets, £10; stake-nets, fly-nets, or stake-weirs (Scotch), £30;

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*M. R.* head-weirs, £6; for every box, crib, cruive, or drum-net in any  
 1910. weir for taking salmon or trout, £10." There was thus an increase  
 IRISH SOC. in duties of from £5 to £10 in bag-nets. Stake-nets or stake-weirs  
 v. (Scotch) were raised from £15 to £30; head-weirs from £3 to £6,  
 FLEMING and OTHERS. and box, crib, cruive, or drum-nets from £5 to £10. It cannot  
 be said that the Legislature were ignorant of their own provisions  
 embodied in their own Act of Parliament, and in the schedule to  
 that Act of Parliament, by which, on payment of £3, and taking  
 out a licence, drift-nets were permissible in Ireland under the Act  
 which was framed "for the protection and improvement of the  
 salmon, trout, and other inland fisheries of Ireland." Shortly  
 stated, my view of these statutes is that "fixed nets" do not include  
 drift-nets, and that drift-nets are not "fixed engines or devices"  
 within the meaning of section 4 of the 26 & 27 Vict. c. 114. I  
 must say that I think that the word "erected" in that section 4  
 is the key to the whole section, and reduces to the level of  
 common sense the whole legislation with regard to these "fixed  
 nets," "engines," or "devices." Of course, when you get a  
 definition section, such as section 1, in the Act I have referred  
 to, you will naturally expect to find a good deal of tautology,  
 and everything is more or less crammed into the definition  
 section. But even when section 1 of the 13 & 14 Vict. c. 88  
 is read, you will find that "the words 'fixed net' or 'fixed  
 engine' shall extend to and include weirs, stake, bag, stop, and  
 still nets"—not a word about drift-nets—"and all other engines  
 or devices used for the like purposes, of whatsoever construction  
 or materials the same may be, or however known or styled, and  
 whether fixed to the soil or held by hand, or made stationary in  
 any other way." On a careful view of the evidence I hold, as a  
 juror, that the evidence given in this case negatives the idea that  
 the operations of the defendants come within any branch of that  
 clause. The nets are not "fixed to the soil," they are not "held  
 by hand," they are not "made stationary in any other way"  
 within the meaning of the section.

Lastly, it is necessary for me to refer to the cases that I  
 mentioned some time ago. In *Gore v. The Special Commissioners  
 for English Fisheries* (1) these words, "made stationary in any

(1) L. R. 6 Q. B. 561.

other way," were the subject of judicial consideration and decision. The English statute, 28 & 29 Vict. c. 121, section 39, makes "fixed engines" include "any net or other implement for taking fish fixed to the soil, or made stationary in any other way, not being a fishing weir or fishing mill-dam." The other words, "held by hand," are not in that definition, but, according to my view, the words "held by hand" in the Irish definition are much stronger in favour of the defendants than Mr. Ronan in his argument supposed. "Fixed to the soil," "held by hand," from where? From the soil, from the shore, or made stationary in any other way.

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Now what was this case of *Gore v. The Special Commissioners for English Fisheries* (1), and what were the facts? It was a case of a stop-net—a stop-net of large size, no doubt, but nothing to compare with the drift-nets in this case. It was a case in which the mouth of the net "is distended by two light poles called rames, which are tied together at one end with a rope, and which end the fisherman keeps his hand upon when fishing. The rames diverge from this upper end gradually until at their farthest they stretch out the mouth of the net to its full width of about 30 feet." Now Blackburn, J., in giving judgment said—"That this was a net is beyond all doubt; and the question is whether this net was made stationary. It is admitted that the rames, the poles I would rather say, on which the net works, are made stationary; and it is very much, as Mr. Matthews puts it, as if there were a bridge across the river, and this net had rested on the bridge. On looking at the description of this net, we find that it is of a very large size, and no human being would have power to hold it up against the tide—a net 30 feet wide, and going a considerable distance into the water. It is rested, therefore, on the side of the boat by its own weight, and it is made stationary, for as long as the boat is stationary it remains fixed and stands there. It is admitted if there was not anything to steady it, the net would, from the pressure of the water below, pass under the boat. Something there must be to keep it there. If it were tied with a piece of rope, it would clearly be made stationary;

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*M. R.* instead of this, the fisherman stands there resting one hand to  
 1910. hold it steady, and it is in consequence of this pressure of the  
 IRISH SOC. hand upon it that it is fixed, yet, notwithstanding that it is a  
 v. human hand which does that, the net is made stationary, and  
 FLEMING consequently is brought within the Act." Well, these poles or  
 AND OTHERS. rames are fixed, and the net in that case was held to be a "fixed  
 engine," and "made stationary." In my opinion, that case falls  
 far short of being an authority in favour of the plaintiffs in the  
 present case.

The second case relied upon by Mr. Ronan—very strongly  
 relied upon, and a most interesting case it is—is the case of  
*The Dunelm* (1), and, not being a nautical man myself, I confess  
 to a feeling of mild astonishment at a question being raised as  
 to whether a trawler going two and a-half knots an hour through  
 the water and four and a-half knots over the ground was  
 stationary, within the meaning of a statutory regulation. I  
 have, perhaps, sufficient nautical experience to remember that  
 sailors sometimes say that "every herring must hang by its  
 own tail"; and, therefore, I read this case in connexion with the  
 particular regulation and with the decision of the Judges.  
 Now, here is what Brett, M.R. (p. 171), says: "My view of an  
 Act of Parliament—and this article is equivalent to an Act of  
 Parliament—which is made applicable to a large trade or business  
 is that it should be construed, if possible, not according to the  
 strictest and nicest interpretation of language, but according to a  
 reasonable and business interpretation, or with regard to the  
 trade or business with which it is dealing. It seems to me  
 impossible reasonably to hold that those who have to regulate  
 a large trade or business should be supposed to have made an  
 enactment which would prevent that trade or business from being  
 carried on, unless you are forced to come to such a conclusion by  
 the language, and then that could only be by the most extra-  
 ordinary inadvertence of those who legislate. . . . To my mind  
 the phrase 'fishing vessels attached to their nets and stationary'  
 is meant to be applicable to a time when the vessels are fishing,  
 because everybody knows when the vessels are fishing they are

(1) 9 P. D. 164.

attached to their nets." It was a case of trawlers. It was a case in which the articles, made, I think, by the Board of Trade, provided that certain lights should be carried—"Fishing vessels and open boats when at anchor or attached to their nets and stationary shall exhibit a bright white light." The question was whether this vessel, being just sufficiently under way to be under control, was still, within the meaning of the Act of Parliament, stationary or not. Brett, M.R., goes on to say (p. 173)—"I think we are bound to give the fullest effect to so strong a word as 'stationary.' It cannot to my mind mean mathematically stationary on the ground; it cannot mean that a trawler is to have no way through the water. It must mean, therefore, some way through the water. How far can we go to make the thing practicable—in allowing a trawler to have way through the water, and at the same time to give full effect to the word 'stationary'? I think that we must say that the trawler must not be going faster than is necessary to keep herself under command while she is attached to her nets. . . . I repeat, then, that we lay down the rule of construction, that although trawlers must in a sense be stationary, it does not mean mathematically stationary, or not going through the water: all the article means is (and it must be confined to this) that in order to be stationary a trawler must not be going faster than is necessary to enable her to keep herself under command whilst she is attached to her nets." Well, that is to a certain extent hard to be understood. But Bowen, L.J., in a few words clears up the whole of my difficulty.—"A vessel to be stationary and attached to her nets." He repudiates the suggestion, and so did Fry, L.J., that they could change "and" into "or"—"A vessel to be stationary and attached to her nets must have a certain motion with the tide if she is going with the tide, and moreover, have a certain minimum of motion through the water for the purpose of keeping her under command, so that she may not be entangled in or encumbered by her nets. But that is all. If she is doing more than that, she is a locomotive changing her place." As I said, that was a decision upon the wording of a particular statutory regulation. The Court felt constrained to hold that it must have been the intention of the regulation to enact that a vessel, if attached to her nets,

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would be stationary, though going through the water at such a rate as might be necessary to keep herself under command. The case was upon the construction of a statutory regulation, and the interpretation had to be adopted in order to prevent what Brett, M.R., says would be attributing to those who made it ignorance of the facts—that is the way I put it—of the trade and business with which they are dealing: The Legislature must be assumed to have known that drift-nets were being issued under the authority of an Act of Parliament on payment by the persons who were using them of £3 licence duty.

The last case was in one sense the most difficult, *Duke of Atholl v. Glover Incorporation of Perth* (1). It is the case which has stopped drift-net fishing in Scotland. According to the evidence of one of the witnesses here, since the decision in that case, no fish have been sent up to Billingsgate Market which bore the marks of drift-net fishing; and there is no doubt, I think, that this case was one which would have had a very serious bearing upon the present case if, in point of fact, the salmon-fishery code in Ireland did not exist. At page 417 of the report, Halsbury, L.C., says:—“Of course, a net, however used, is in itself an obstruction; but there is all the difference in the world between the temporary use of a net in the act of catching a fish and what I have described as a wall of net remaining and intended to remain for a considerable time motionless and in that sense fixed.”

Well, I have already mentioned that Mr. Sullivan in his argument took a distinction between that case and the present. These drift- or hang-nets were shot in the River Tay about one hour at the turn of the tide, both at high and low water. They are run out of the boat, at the stern, across the river, and when the man in the boat feels the net struck by a fish he rows to the spot and captures it, or, if the fish is getting away, he secures it with a gaff; while, in the present case, as Mr. Sullivan pointed out, there was a system here which resulted from the operation of the tides, but it is no necessary part of the operation of fishing. Lord Macnaghten says:—“I do not think it is at all necessary

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to discuss those cases" (that is cases decided before *Hay v. The Lord Provost of Perth* (1)) "or to inquire whether the law as to net-fishing in Scotland has been deduced by a process of liberal interpretation permissible in Scotland and not altogether unknown in England from enactments, in some cases at any rate, rather limited in their scope, or whether those ancient statutes are to be regarded merely as examples and instances of particular cases in which the Legislature thought fit to interpose by special prohibition for the purpose of checking practices growing up here and there in contravention of the common law. However that may be, it seems to me that the law on the subject is now finally settled by the decision of this House in *Hay v. The Lord Provost of Perth*" (1). And then the learned Lord, at page 420, proceeds to discuss and criticize the judgment in *Hay's Case* (1), and, to my mind, in his judgment is to be found the real reason for the decision in *The Duke of Atholl v. Glover Incorporation of Perth* (2), so far as it applies to the present case. Page 421:—

"‘The judgment of the Lord President,’ observed Lord Chancellor Westbury, ‘expresses correctly the rational interpretation of the law.’ ‘I think,’ said the Lord President, ‘the question may be put in this form, Is this net and coble, or is it not? This is the real question apart from the other question as to putting obstructions into the alveus of the river. Is this a fair exercise of the right of fishing by net and coble, or is it not?’ ‘I think,’ added his Lordship in a subsequent passage of his opinion, ‘that improvements upon the net and coble mode of fishing, so long as it is fair net and coble, are just as lawful as improvements upon anything else.’ The view of the Lord President was adopted in substance by Lord Westbury, and in terms by Lord Chelmsford. ‘The only point to be determined,’ said Lord Chelmsford, ‘is whether the mode of fishing employed by the appellant falls under the description of net and coble fishing, or is such an addition to, and variation from, the sort of fishing understood by that denomination as to render it a distinct and different kind.’ Both the noble and learned Lords who heard the case were agreed that net and coble fishing in the ordinary way did not admit of the

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*M. R.* use of a fixed net. Of course people may fish illegally with net  
 1910. and coble, just as people may fish illegally with rod and line.  
 IRISH SOC. The instruments used may be perfectly legal in themselves, but  
 v. they may be used in an unlawful manner.”  
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In my opinion that judgment applies to the well-defined, well-understood law of Scotland, and is a decision based upon the very principles laid down by Lord Westbury and Lord Chelmsford, and approved of by Lord Macnaghten. The particular question to be tried in that case was, is this net and coble fishing, with a fair improvement, or is it not? From the earliest times net and coble was a very well-understood description in relation to salmon-fishing in Scotland, and the use of a drift-net manifestly was considered not a “fair improvement” upon that description of fishing—net and coble.

If the law of Ireland was the same as the law of Scotland, I would have no option but to follow that case; but, with all respect, and having considered the judgments with more anxious care, perhaps, than I have considered any judgments, I have come to the conclusion that the real distinction between that case and the present case is, that there was but one question to be tried there—the question arose upon the law applicable to Scotland—and that in the present case I am bound to have regard to the code of statutes relating to salmon-fishing in Ireland; and that, whether the plaintiffs are regarded from the point of view of the Irish Society, the lessees of the Irish Society, or the Attorney-General intervening, as I believe he intervenes, in this case solely with the view of protecting the food of the people, with the view of having the law decided as to the right of the public to capture what I will call this valuable item in the food of the community—I will put it that way—whether you regard it as an action by the Irish Society, their lessees, or by the Attorney-General, on the ground and in the interests that I have mentioned, the action equally fails for the reasons I have given.

W. L.

The plaintiffs appealed (1).

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Ronan, K.C. (*Denis S. Henry, K.C., and A. K. Overend* with him), for the appellants:—

Nov. 23-25,  
28, 29.

No question has been, or could be, raised as to the title of the Society to their several fishery in Lough Foyle. That was established half a century ago in *Allen v. Donnelly* (2).

The system of fishing pursued here, according to uncontradicted evidence, comes exactly within the words of Lord Halsbury in his judgment in *The Duke of Atholl v. Glover Incorporation of Perth* (3), where he says, at p. 417: "The mode in which they," the appellants, "operate is not an act of fishing at all. It is a wall of net suspended across the stream—not to operate to catch fish in the ordinary mode by which a net is used to catch fish, but fixed and operating as an obstruction through which the fish attempts to get and entangles himself by his efforts to get through the net, and so is caught. This doubtless is the way in which fish are caught when herring nets are in some places put into the sea, but such an operation is not, to my mind, an act of fishing at all, and the evidence as to a succession of nets used in this way all up the stream, shows what an enormous obstruction to the ascent of the fish is thus created; and, undoubtedly, this is one of the reasons which led the Scottish Parliament to enact that fixed engines were unlawful."

The public right of fishing in the sea is equal to the public right of fishing in a navigable river (*Viner's Abr.*, vol. xvi, p. 574 (B.a) 5): "Every water which flows and reflows is called 'arm of the sea.' Such river participates of the nature of the sea." "Every subject of common right may fish with lawful nets, &c., in a navigable river as well as in the sea": *Warren v. Mathews* (4). But the fact that these rights are commensurate shows that the public can only do what the owner of a several fishery could lawfully do. No question as to the rights of the Crown over the

(1) Before THE LORD CHANCELLOR, and LORDS JUSTICES HOLMES and CHERRY.

(2) 5 Ir. Ch. R. 229, 452.

(4) 6 Mod. 73.

(3) [1900] A. C. 403.

*Appeal.* three-mile limit arises here, because the waters here, being enclosed  
 1910. within a creek, are undoubtedly part of the realm: *The Queen v.*  
*IRISH Soc.* *Keyes* (1). The test is, could the proprietor of a lower fishery  
*v.* use those kind of nets, and pursue this method of using them  
*FLEMING* against an upper proprietor?  
*AND OTHERS.*

According to the evidence in this case, the fishing as carried on by the defendants and others is a nuisance at common law. They block up each night for some hours the access of fish from the sea to the plaintiffs' fishery. Secondly, the nets are fixed engines, and illegal under the Irish Fishery Acts.

The Master of the Rolls appears to have thought that because the act of one of the defendants in shooting out a single net as described would not amount to a nuisance, the aggregate of all of them could not be such. In this, it is submitted, the learned Judge was in error: "A cause of action for nuisance may be created by independent acts of different persons, though the act of any one of these persons would not amount to a nuisance": Pollock on Torts, 8th ed., p. 414 (g); *Thorpe v. Brumfitt* (2); *Lambton v. Mellish* (3); *Blair v. Deakin* (4). *Sadler v. Great Western Railway Co.* (5) arose upon a summons to amend the pleadings. That case did not decide that a combination of several persons constituting a nuisance was not actionable. Each company there was sued for a separate tort. The basis of the decision of the House of Lords was that the two companies could not be joined as defendants in one action: See *per* Lord Halsbury, p. 454, *Bullock v. London General Omnibus Co.* (6) was also a case arising upon the pleadings. There joint negligence was alleged against both defendants, with an alternative allegation of negligence on the part of each. The Court of Appeal distinguished the case from *Sadler v. Great Western Railway Co.* (5), relying on the alterations made in Order XVI, Rule 1, as amended in 1896 (Ir. Order XVI, Rule 1 (1905)). See cases collected in Annual Practice, 1911, notes, p. 179.

As to the public right to fish in any part of the sea over

(1) 2 Ex. D. 63.

(2) L. R. 8 Ch. App. 650.

(3) [1894] 3 Ch. 163.

(4) 57 L. T. (N. S.) 522.

(5) [1896] A. C. 450.

(6) [1907] 1 K. B. 264.

which the dominion of the Crown extends, the rule is accurately stated in Longfield's Fishery Laws of Ireland, 1st ed. (1863), p. 15:—"It is clear that the *public* or common fishery in tidal waters could, at common law, have been exercised by nets and lines and hooks only. The attempt to place any fixed engine on shores, the property of the Crown, or over which the Crown's right of property and dominion extended, was illegal and punishable." The same principles applied as between upper and lower proprietors in inland waters: *Hamilton v. Donegall* (1): see judgment of Lord Fitz Gibbon, C., pp. 324, 325. Glanville, lib. ix., c. 2, treats weirs as a nuisance at common law: see *per* Pennefather, B., at the trial of *Regina v. Ryan* (2); *Weld v. Hornby* (3), *per* Lord Ellenborough, p. 197; *Williams v. Wilcox* (4); *Fraven v. Orr* (5). *Hamilton v. Donegall* (1) was recognized as containing a correct exposition of the law by Porter, M.R., in *Wilson v. Moy Fishery Co.* (6). [Counsel read section 4 of 26 & 27 Vict. c. 114 (Conner on Fisheries, 2nd ed., 221) and the preamble 13 & 14 Vict. c. 88 (Conner, 170).] The definition of "fixed net" in the preamble of the Act of 1850 is quite as wide as the construction put upon the words in 10 Car. 1, Ir., Sess. 3, c. 14, by the Court of Exchequer in *Freuen v. Orr* (5).

The Master of the Rolls held that the crucial word in section 4 of 26 & 27 Vict. c. 114, is "erected." But to render a net a fixed net or fixed engine within that section it is not necessary that it should be erected on the soil—it is not necessary that it should be held in the hand of a person standing on the bank. It is enough if it be "made stationary in any other way," 13 & 14 Vict., section 1. But the Master of the Rolls, when dealing with what he says is the real difficulty of the case, namely, the difficulty which he saw occasioned by the Fishery Acts, gets over it by qualifying the definition section in the earlier Act by the use of the word "erected" in section 4 of the Act of 1863.

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(1) 3 Ridg. P. C. 267.

(2) 8 Ir. L. R. 122, note.

(3) 7 East, 195.

(4) 8 A. & E. 314.

(5) Long. & T. 601.

(6) 19 L. R. I. 270, at p. 291.



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By the 25 & 26 Vict. c. 97, the Salmon Fisheries (Scotland) Acts, 1862, section 10, fishing for salmon by any mode prohibited by any statute relating to salmon fisheries in Scotland at that date (1862) was declared unlawful, and it was provided that nothing in the Act or any by-laws made by the Commissioners to be appointed thereunder should render legal any mode of fishing which was or would have been illegal at that date. Apparently the old Scotch statutes, enumerated, in [1900] A. C., p. 410, are still in existence. The result of these ancient statutes was summed up by Lord Westbury, L.C., in his judgment in *Hay v. Lord Provost of Perth* (1) : see p. 543. That case affirmed the legality of the Bermoney boat-fishing as between rival heritors. At p. 547 the Lord Chancellor expressly repudiates the idea that the Scotch legislation was intended to maintain fair play between rival proprietors. That legislation was directed to other objects : free access to the upper fresh waters, free return to the sea of the young fry, and prohibition of killing fish in the close time. These were clearly the objects of the Home-Drummond Act (9 Geo. 4, c. 39), which preceded the Act of 1862, and it was entirely confined to these objects.

In *The Masters of Allan's Mortification v. Thomson* (2), it was held that the net used was not a fixed engine. Lord Shand describes the operation at p. 228 : "It is admitted that, in the course of the hour and a-half or two hours during which the respondent fishes before the turn of the tide, he usually traverses a distance altogether of about three miles, so that the net progresses through the water at the rate of a mile or upwards in the hour."

That was followed eleven years later by *Earl of Wemyss v. Earl of Zetland* (3). There the Lord Justice Clerk (Macdonald), referring to Lord Westbury's judgment in *Hay v. Lord Provost of Perth* (1), says that it established that net and coble were the symbols of fair river-fishing, and that the use of the net in question was no more than a modified form of net and coble fishing ; and it was sought to distinguish those cases from *Dirom v. Littles*,

(1) 4 Macq. 535.

(3) 18 Rettie (4th Series), 126.

(2) 7 Rettie (4th Series), 221.

Morison's Dict., vol. xxxiii, p. 14282, where hang-nets (1) were held illegal. But those decisions were challenged in *Wedderburn v. Duke of Atholl*; *Duke of Atholl v. Glover Incorporation of Perth* (2); and were overruled. Lord Macnaghten said, [1900] A.C. 420: "I must say, speaking for myself, that I rather prefer the simple test proposed by Lord President McNeill and Lord Chelmsford" (i.e. in *Hay v. Lord Provost of Perth* (3)) "to the more elaborate disquisition of Lord Westbury, which led that noble and learned Lord incidentally to the conclusion that fishing with a casting-net was very much the same thing as fishing with a draft-net, and which in the case of *The Masters of Allan's Mortification v. Thomson* (4) contributed in some degree to a decision not, I think, in accordance with established principle." Lord Halsbury, after describing the nets used in the two cases before the House of Lords (*Wedderburn v. Duke of Atholl*; *Duke of Atholl v. Glover Incorporation of Perth* (2)) as a "wall of net suspended across the stream," comes to the conclusion, notwithstanding the alleged motion, that they were fixed nets and unlawful; and Lord Macnaghten says, p. 423: "Apart from the use of the gaff, which is apparently illegal when used as an auxiliary to net-fishing, it seems to me to be clear that this mode of fishing is not fair net and coble, but an evasion and perversion of net and coble, and something substantially different from it. Indeed, I think it would be impossible to find two sorts of net more different, the one from the other, than the ordinary draft-net and the ordinary drift-net." In *Hay v. Lord Provost of Perth* (3) Lord Westbury prefaces the reason for his decision in favour of the Bermoney boat-fishing by saying, p. 542: "It was a just remark of Lord Eldon, sixty years since, that the decisions in the Courts of Justice in Scotland upon the subject of salmon had gone far beyond any

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(1) The hang-net was fixed by one extremity on the shore and then drawn diagonally across a smooth part of the river, and reaching not above one-half of the breadth of it. The other end of the net was left loose. One side of the net was sunk by small pieces of lead, and the other supported by cork, so as to make the net stand perpendicular in the water; and when a fish came against it, the net yielded, and the fish was caught by being entangled in it.

(2) [1900] A. C. 403.

(4) 7 Rettie (4th Series), 221.

(3) 4 Maoq. 535.

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principles embodied in the statute law." And after remarking that it had been tried to support these decisions on some common law principle he adds: "But with the exception of the general principle that salmon fishing is *inter jura regalia*, and the other constitutional principle, that the bed and soil of navigable rivers are vested in the Crown, I am unable to find any rule or principle of common law that is not embodied in the statutes themselves upon the subject, which in truth, especially the earlier ones, may be considered as declaratory of the common law."

It is said that, because the respondents had paid licence duty for these nets, the payment carries with it the right to use them; and No. 5 in the Schedule to 11 & 12 Vict. c. 92, imposing a duty of £3 on drift-nets, is relied on as showing the lawfulness of that kind of net. But in *R. (Johnston) v. Coleraine Fishery Conservators* (1), this Court, affirming the decision of Lord O'Brien, L.C.J., the dissentient Judge in the King's Bench Division, held that this was not so. The point decided cannot be put more clearly than was done by the Lord Chief Justice in his judgment, with which every member of this Court expressed concurrence: "The granting of it" (the licence) "leaves untouched the question of illegality as to time, place, mesh, and the detailed mechanism of the instrument, or as to the rights of other persons," p. 243. Mr. Conner's commentary on this case (*Fishery Laws*, p. 161, note (a) to 11 & 12 Vict. c. 92, s. 31) is: "Once the licence exists in the statutory form, and is demanded, and the duty tendered, the board of conservators cannot refuse to grant it; but possession of it does not secure immunity for those who fish illegally." It is the same with a game licence, which does not justify the illegal use of a gun. There is nothing in the statute to prevent anyone applying for and getting a licence during the close season, but that would not entitle him to fish in the close season. Section 26 of the Act 26 & 27 Vict. c. 114, was relied on in the Court below as a distinct statutory recognition that drift-nets were not fixed engines; but the purpose and object of that section was only to alter the duties on certain fixed engines. Section 46 of that Act guards against the legalization thereby of any fixed net

(1) [1906] 2 I. R. 219, 244.

contrary to any Act of Parliament or common law in force in Ireland. Several undoubted fixed engines are left by the 26 & 27 Vict. c. 114 untouched as to duty, *e.g.*, Numbers 8 and 14 in Schedule of the Act of 1848. And, similarly, section 19 of the 13 & 14 Vict. c. 88 provided that nothing in the special legislation should abridge the power of the Courts to remove or abate nuisances to navigation, fishery, or the passage of fish, by placing, maintaining; or using weirs, fixed nets, or other contrivances.

It is said that the plaintiffs' only remedy is to apply to the Privy Council for a by-law prohibiting this mode of fishing; and then, if it be persisted in, to sue for penalties. But that is not so. The point was raised and decided in *Lord Massey v. Cassidy* (1). There it was held by the Vice-Chancellor, and by the Court of Appeal affirming his decision, that the owner of a several fishery can pursue his common law right to protect his property against a mode of fishing statutorily illegal and punishable by penalties. Law, L.C., said that the question was ruled by *Hamilton v. Donegall* (2) and *Frewen v. Orr* (3).

These nets were "erected." "Erect" means "perpendicular." They were "stationary" within the meaning of the statute. If the view taken by the Master of the Rolls of the word "erected" is right, it would reverse many decisions of the highest authority. All the reasoning of Lord Shand was to the same effect, and it was reversed by the House of Lords. These nets cannot be distinguished on any rational ground from those which in *The Duke of Atholl v. Glover Incorporation of Perth* (4) were held by the House of Lords to be "fixed nets." That decision is binding on the Court; and as they are "fixed nets," they are illegal under the Irish Fishery Acts. Even if they were legal, the mode in which they are used constitutes a nuisance.

*A. M. Sullivan, K.C.* (with him *Gordon, K.C.*, and *Dougherty*), for the defendants:—

In the report of *The Masters of Allan's Mortification v. Thomson* (5) in the Scotch Court of Session, 7 R. (4th series) 221, the Scotch

(1) 13 L. R. Ir. 97, 102.

(2) 3 Ridg. P. C. 267.

(3) Long. & T. 601.

(4) [1900] A. C. 403.

(5) 7 Rettie (4th Series), 221.



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law is stated by Lord Shand at p. 227. After describing the mode of fishing there complained of, he says there was no new engine used, and that as to the peculiarity of the fish being caught, not by enclosure, but by entanglement in the meshes of the net, there was no law making illegal any peculiarity in the net used. He says (p. 228): "A net may be used either for entanglement or for enclosure, and I know nothing in law to prohibit the one kind of use more than the other. The one may be more deadly than the other, but that is of no moment provided the net is not a fixed engine." And Lord Deas: "There is here really a modification of fishing by net and coble."

In *The Duke of Atholl v. Glover Incorporation of Perth* (1) all the Lords, except Lord Halsbury, base their opinions on the ground that the method pursued was not net and coble fishing. Lord Brampton says, at p. 429: "If I had before me simply the evidence of Maxwell, one of the defendants' witnesses, I could come to no other conclusion than that the object of the hang-net was not to capture fish in the ordinary way by net and coble, but to impede the progress of the fish, whether going up or down the river; to keep them on that side of the net they might chance to be approaching until they became unable to escape from the gaff, whether they previously had become entangled in the net or not"; and Lord Macnaghten says, p. 419: "It seems to me that the law on the subject is now finally settled by *Hay v. Lord Provost of Perth* (2), and that nothing would be gained by trying to go behind that case." In Scotland the only legitimate mode of fishing for salmon was by net and coble, or by rod and line; but in Ireland every subject by common law is entitled to fish for salmon in the open sea by any means not prohibited by statute. [Counsel referred to 5 & 6 Vict. c. 106, ss. 18, 19, 21 (3), 22, 23, 24, 26, and 38; 8 & 9 Vict. c. 108, ss. 2, 3, 11; 11 & 12 Vict. c. 92, ss. 13, 21; 26 & 27 Vict. c. 114, ss. 3, 4, 6.] In the provisions as to fixed nets in the Act of 1863 nothing is said as to drift-nets. In *R. (Johnston) v. Coleraine Fishery Conservators* (4) it could never

(1) [1900] A. C. 403.

(2) 4 Macq. 535.

(3) Superseded by 26 & 27 Vict.

c. 114, ss. 5, 7, 13, and repealed by Statute Law Revision Act, 1894.

(4) [1906] 2 I. R. 219, 244.

have been present to the mind of the Court that they were granting a mandamus to issue a licence for an illegal net. It appears to have been suggested there on the part of the intervenients, who were held to have no *locus standi*, that poaching was the object of the prosecutor. FitzGibbon, L.J., says: "The same section which gives the right to demand the licence prevents its issue from conferring any right to use it or any other instrument for taking fish by any means or in any place not thereby authorized, and from affecting the right of any other person"; and then his Lordship proceeds to point out the remedy in the case of abuse of a licensed net: "It is for the conservators or the Department of Agriculture, or for any person aggrieved, with the aid of the law or of the Privy Council, to protect private rights, and to stop illegal fishing, and to prevent detriment to fisheries in general as well by legal proceedings as also by obtaining any necessary by-laws regulating the user, size, character, mesh, or shape of the instrument to be used." Again and again the Privy Council have made by-laws with respect to drift-nets without a suggestion that such nets were illegal. And the plaintiffs, adopting Lord Justice FitzGibbon's advice, proceeded to obtain a by-law in terms giving them the relief which they seek to obtain in this action—a prohibition of the defendants' right to fish in the way and in the place in which they have been doing for half a century; but the Privy Council, on hearing evidence, and after the fullest consideration of the matter, refused their sanction to such a by-law.

This mode of fishing is not a nuisance at common law. All the witnesses are agreed that the best time is at slack water. How often would that occur in five nights per week in a season not ranging over more than six weeks? It is very rarely that a number of boats fish in the same place at the same time.

In *Thomas v. Jones* (1), a case decided upon the English Salmon Fishery Act, 1861, there were three nets, 6 yards in length, and 1 yard 16 inches in depth, set about 12 yards apart, and extending to near the middle of a river. Each was fixed at one end to a large stone lying on the bank, and at the other end they were

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kept up by corks, with lead to keep them down the river, which was 3 or 4 feet deep. It did not appear whether the nets reached the bottom. They were always placed in quiet water, not in a current. When a salmon touched the net, it gave way and gathered together, and the salmon got entangled, was rolled up like a rabbit in a net, and died. It was held by the Court of King's Bench (Crompton, Mellor, and Shee, JJ.) that these nets were not fixed engines. They scouted the idea that the nets were anchored or fixed to the soil. Crompton, J., said, "If one of them is not a fixed engine, three in a line would not be such"; and he expressed the opinion that it was a more innocuous mode of fishing than nets being drawn down the river by boats in rapid succession.

A frontager cannot complain of crowds of people in the exercise of the right of the public passing his premises on the king's highway, even though he may deem it an inconvenience to himself; and no more can the owner of a several fishery object to the public exercising their right of fishing outside the limits of his fishery in the open sea—the king's seaway.

*Gordon, K.C. : —*

The right of the public to fish in the open sea can only be taken away or limited by statute, or by-laws made under a statute. First, are the nets used by the defendants "fixed nets"? There is in Ireland a code defining "fixed nets" and "fixed engines" for salmon-fishing. There is no such code in Scotland. But the Scotch Courts held that anything which was not recognized as a lawful net, *i.e.*, net and coble, or a legitimate modification of it, was an obstruction to the passage of fish up a river like the Tay, and consequently illegal.

There are at least two points of difference between the *Tay Case* (1) and this. In the Tay the fishing by hang-nets was carried on at each slack tide, whether that occurs in the day time or at night. The nets remained twenty or forty minutes in the water, during which time no fish could pass. Secondly, the fish

were taken out of the net by hand or gaff. Lord Halsbury's judgment was based on the fact that the hang-net was a fixed net according to the evidence given in the case. The fishing here is pursued at night irrespective of the tide—the net is allowed to drift with the tide. It would drift at such a rate as that boat and net would pass over three miles in an hour. In Ireland, unless a particular kind of net is prohibited, the public are entitled to use it. As long as the boat is not anchored, and the boat and net are drifting, it is impossible to say that they are a "fixed engine" or "erected."

As to the question of nuisance, the fishing is only carried on five times in the week, during a period of five or six weeks, and in the hours of darkness in midsummer. [Counsel analysed the evidence as to the number of boats fishing together and the quantities of fish taken.] It is not alleged that one, two, or three boats fishing in the manner described could be, with any show of reason, called a nuisance. Plurality is what is relied on by the plaintiffs.

In the three English cases cited, the act of each individual was unlawful in itself. Thus, in *Lambton v. Mellish* (1) Chitty, J., says, p. 165: "I consider that the noise made by each defendant is a nuisance." He then goes on to deal with the circumstance of there being two organs, which was a matter quite unnecessary for the decision of the case, having regard to the opinion he had expressed as to the one. In *Thorpe v. Brumfitt* (2) James, L.J., says, at p. 656, that it was quite unnecessary to show the share which each defendant took in the obstruction. There also the act of each defendant was unlawful, although not actionable, as it did not cause appreciable damage. *Blair v. Deakin* (3) was the case of pollution of a river; and the pollution of a natural stream by a single individual may be restrained as a nuisance. But here each of the fishermen was doing a lawful act—exercising a lawful right. The charge of combination between them failed, and was abandoned. They were acting independently of one another, each doing his best for himself, in a perfectly lawful pursuit.

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(1) [1894] 3 Ch. 163.

(3) 57 L. T. (N. S.) 522.

(2) L. R. 8 Ch. App. 650.



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Then it is said that drift-nets are in themselves illegal. Whatever be the law in Scotland, in Ireland their legality is recognized by Act of Parliament, and licence duties are imposed on them: 11 & 12 Vict. c. 92, schedule; 26 & 27 Vict. c. 114, sect. 26.

As to regulating the area within which the fishing may be carried on, and the kind of nets to be used, the remedy is to apply for a by-law, and if such be granted by the Department, to get it sanctioned by the Privy Council; but the plaintiffs have already had recourse to this remedy, and the Privy Council decided against them on the merits.

*Ronan, K.C.*, in reply:—

If all the boats belonged to Harold, and were fished by him and his servants, Harold would be liable for causing a nuisance. Once the fact of a nuisance is established, it is wholly immaterial whether it is caused by one or several acting independently. Take *Lambton v. Mellish* (1): the act of each individual, whether it was wrongful or not, was not actionable so long as it did not cause appreciable damage, but when such damage arose from a number of similar acts done by a number of people, whether they were acting independently or not, a cause of action existed.

Rigby, L.J., in *Sadler v. Great Western Railway Co.* (2) clearly lays down (p. 695) that innocent acts by “a plurality of people,” though not in combination, may create a nuisance.

The argument on the other side amounts to this, that drift-nets can never be a nuisance. The mode of fishing and the nets used here are exactly similar to what was condemned by the House of Lords in *The Duke of Atholl v. Glover Incorporation of Perth* (3). What is the difference between the Scotch law and ours which can make that case inapplicable in this country? and the rule it lays down is that if, as in net and coble fishing, the net catches the fish, that is lawful; but if the net be such that the fish catches itself in it, that is an illegal method of fishing. That is a proposition that is just as applicable to Lough Foyle and its approaches as it is to the River Tay.

(1) [1894] 3 Ch. 163. (2) [1895] 2 Q. B. 688. (3) [1900] A. C. 403.

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The plaintiffs in this action are the Irish Society, and six lessees of that Society, and the Attorney-General for Ireland suing by the same six lessees as relators. The Irish Society and its lessees are admittedly the owners of a several fishery for salmon in the tidal and inland waters of the River Foyle and Lough Foyle inside an imaginary line drawn from Magilligan Point in the county of Derry to Greencastle in the county of Donegal. The defendants are members of the public who fish for salmon by drift-nets in the open sea outside the limits of the plaintiffs' several fishery. Four of the defendants have given a consent for judgment against the use of drift-nets by them within the limits from Malin Head to Rubonid Point, but four of the defendants, being Edward Harold, Thomas Reynolds, John Barr, and John M'Dermott, have throughout contested the action, and their rights are in no way affected by the consent for judgment, which, in fact, relates to a place far north and west of the place at which mainly the alleged illegal fishing by drift-nets was pursued in this case.

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The present case is only conversant with the rights of the plaintiffs to take salmon, and the plaintiffs seek a declaration that the drift-nets used by the defendants may be declared to be an unlawful obstruction to the passage of salmon to the Lough and River Foyle, and a nuisance at common law to the Irish Society and their lessees and other subjects of His Majesty; also that the said nets used may be declared to be fixed engines within the meaning of the Fisheries (Ireland) Acts, and that the nets used as aforesaid may, on account of their construction and design, be declared to be so destructive and injurious to fish that their use is a like nuisance at common law.

A few words will explain the locality and help to make intelligible the evidence adduced.

The River Foyle, coming down from the direction of Newtownstewart, in the county of Tyrone, flows by and along the city of Derry, and on below it to Culmore Point, where it reaches and flows into an arm of the sea called Lough Foyle. The River Foyle is tidal and navigable up to and for a considerable distance above the city of Derry, and the fishery rights of the plaintiffs for

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 IRISH SOC. higher up at Derry near where a bridge spans the river. The  
 v. fishery is a very valuable one, and the plaintiffs allege, and no  
 FLEMING doubt the fact is, that they expend large sums each year in  
 AND OTHERS. the protection of salmon which enter the river from the sea and  
 The Lord pass up to spawn in the Foyle and its tributaries, and they also  
 Chancellor. maintain a hatchery in the upper waters.

Lough Foyle, which, as I have said, is an arm of the sea into which the Foyle flows, extends for more than five miles to a point where the lands in the counties of Londonderry and Donegal narrow to the entrance into the Lough, having Magilligan Point on the Londonderry side and Greencastle on the Donegal side. The distance between those points is marked on the map as 1255 yards. It is not disputed that the plaintiffs are, by a paper title under their patents, and user under them, the owners of a several fishery in the tidal waters inside a line drawn from Greencastle to Magilligan Point, and the case must be dealt with on that assumption.

Seaward of Magilligan Point there is, in the open sea, a bank called the Tuns Bank, of a triangular shape, with a light buoy at each end. It is covered with water except a small portion at spring tides, and it forms two channels—the north channel on the Donegal side of it, and the south channel on the Londonderry side. The north channel extends for about three miles to Innishowen Head, and is roughly about three-quarters of a mile in width. The south channel is much narrower and shorter. Both channels are navigable, and are the approaches to Lough Foyle, but the south one is used by smaller vessels only.

Having thus obtained an adequate conception of the nature, locality, and extent of the north channel, upon the acts done in which by the defendants the decision of one of the two great questions in the case almost entirely depends—for all their acts done northward of the north channel are comparatively trivial and unimportant—I proceed to deal with those two questions. For the present I shall pass by the great question whether drift-nets are in themselves illegal as fixed engines. If they are, there is no more to be said, and every drift-net used round the south and west coasts of

Ireland is an illegal engine, and the plaintiffs are, as of course, entitled to obtain an injunction against their use; but for the purpose of considering the question which I propose first to deal with, I am entitled to assume, and shall assume, that drift-nets are legal engines and can be lawfully used.

Now, this first question is entirely one of fact—Did the defendants, in the words of the first paragraph of the prayer, create by their drift-nets an obstruction to the passage of salmon to the Lough and River Foyle, and a nuisance at common law to the Irish Society and its lessees and other subjects of His Majesty?

The first question here is a question of fact. The plaintiffs rely on the decisions of which *Hamilton v. Donegall* (1) is one of the best examples, and contend that the acts of the defendants are equivalent to what was done by Lady Hamilton in that case in the Bann as against Lord Donegall, the owner of the several fishery in the upper waters. There there was an actual obstruction by artificial erections to the passage of the salmon up the River Bann.

In order to appreciate properly what was done by each of the four defendants who remain on the record, viz., Harold, Reynolds, Barr, and M'Dermott, and the legal consequences of their acts, we must first see what are the relative rights *inter se* of each of those four and the plaintiffs. The plaintiffs can lawfully catch salmon by all lawful means throughout the whole of their several fishery. But each of the defendants has in the open sea, outside the line where the several fishery begins at Greencastle, the right as a member of the public to fish for and catch all the salmon he can. Every one hundred salmon taken round the coast of Donegal *pro tanto* subtracts from the number of salmon which might enter the plaintiffs' several fishery, and might, perhaps, be taken in their nets in the Foyle; but this gives no cause of action to the plaintiffs. The large body of the public who fish for salmon in the open sea below, and make their living by it, have just the same rights as the plaintiffs.

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(1) 3 Ridg. P. C. 267.



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But the acts of the defendants from which a cause of action is said to arise are practically confined to the north channel, which extends for some four miles, from Innishowen Head to Greencastle, and they are to be found in the evidence of the witnesses M'Dermott and Patterson, modified to some extent by the defendants' witnesses.

The drift-net fishing complained of begins about the second week in June, and ends in the last week of July; but as that is the period within which it is practised, I assume it to be the most profitable time. Patterson refers to eleven instances in June and July, 1908, in which drift-nets were used in the north channel. The number of boats varied naturally, having regard to that area of the north channel in which they were. The greatest number was twenty-nine on one occasion, and the smallest six. The largest take deposed to was, I think, sixty-five fish, but this was probably not easy to estimate by the plaintiffs' witnesses.

There is no controversy as to the kind of net used, and substantially no controversy as to the mode of using them. The nets are made of fine twine, are about 15 feet in depth; a light cord runs along the top to which corks are attached, and the lower rope is leaded sufficiently heavily to keep the net perpendicularly across the tide as long as possible: and they are fished from a boat containing four or five men. There is a dispute as to the length of the nets. They are variously estimated at from 1000 yards down, and one witness says 600 yards would be a good average. I rather think they would use whatever length would be most efficient, bearing in mind that a long net is more difficult to keep fishable in a tide. The mode of fishing is admitted. They are fished at night, and the time they are fished is about a period of three hours, including half an hour spent in shooting and boarding them. They are attached to the boat by a rope, some 20 yards long, to prevent them being lost in the dark. The best time is the last of the ebb tide and first of the flood, in a moderate breeze. The fishing in the places deposed to generally allowed of there being two shots, the first boat arriving at the protected line hauling in, and rowing back to take its place in the rear. At high and low water, they may be nearly stationary for fifteen minutes. They thus drift slower and quicker

according to the run of the tide. The fish are caught by striking against the floating net, and they are generally gilled in the meshes, though sometimes they get entangled in the wings. The nets are hauled in, when they get out of fishing form and may be re-shot. The nets were said to be fished at distances from each other of 50 yards, 100 yards, or 150 yards. It is probable, I think, they were fished just at such distances as would make fouling of nets unlikely.

The plaintiffs alleged a head of damage in this, that fish striking against the net would return to the sea, and not pass up, that season. That seems to me no legal head of damage as regards those nets; and they also complained that fish which had been meshed and escaped were marked and injured in price. If the fishing was otherwise legal, I do not think this could be taken into account.

One of the principal arguments to show the alleged injury resulting to the plaintiffs from the use of drift-nets was a carefully prepared table of the number of licences issued since 1875 in the Londonderry district, and the number of fish taken in plaintiffs' several fishery in each of the years corresponding. This table seems to me wholly fallacious, and really accords with what has been always the experience in the catches of salmon, viz., that there are cycles of good and bad years. Take for instances the years in the table—1897, 1899, 1903, 1904, and 1908, and it will be seen no inference can be drawn from the tables as compared with the licences issued. It was stated the take in 1909 was 39,000 odd.

Upon this first question I am unable to find in the acts of the defendants, even taken together, sufficient evidence to establish the existence of an obstruction to the plaintiffs' several fishery, and a nuisance, having regard to the relative rights of the defendants and the plaintiffs, which *prima facie* were equal.

It was hardly contended by the plaintiffs' counsel, that the evidence of what was done by any one of the defendants in fishing by drift-nets would justify their obtaining a judgment against any such one that a nuisance had been created to plaintiffs' fishery; but they said, as we find there are several defendants who fished with drift-nets in the north channel, we are entitled to treat the

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acts of all together as a combined act which will constitute a nuisance which the Court will restrain; and for this the cases of *Thorpe v. Brumfitt* (1) and *Lambton v. Mellish* (2) were relied on.

As I am of opinion that the acts of all did not constitute a nuisance, it is not necessary to pursue this question further.

It has been established that the acts of several persons may together constitute a nuisance which the Court will restrain, though the damage occasioned by the acts of any one, if taken alone, would be inappreciable; but I should be surprised to find this doctrine extended to this case of several persons lawfully, and by lawful means, fishing, with the same rights as the plaintiffs, each fishing not only independently of the other, but desirous to take as many salmon as he lawfully could—the other persons fishing near him having exactly the same objects in view by a like lawful fishing. I hardly think such a case analogous to the acts of several who each, without right and unlawfully, obstruct a right of passage, as was the case in *Thorpe v. Brumfitt* (1).

I come now to the second branch of the case, equally strongly pressed by the plaintiffs' counsel.

They say fishing by a drift-net for salmon in the manner proved in the evidence in this case is fishing by a fixed net or other fixed engine, and absolutely illegal *per se*, and that they are entitled to an injunction against its use; and in support of that they rely on the decision of the House of Lords in *The Duke of Atholl v. Glover Incorporation of Perth* (3).

There is no doubt that in Scotland fishing for salmon by a fixed net or other fixed engine is illegal. It is not material to consider whether this is part of the common law of Scotland or contained in the provisions of some early statute which I have been unable to trace.

But in the year 1900 the question came up for decision in the House of Lords, whether fishing for salmon in the estuary of the Tay, with nets, and in a manner said to be the same as the fishing in the North Channel in the present case, was fishing by a fixed net or other fixed engine, and was illegal. It was decided that it was, and since the date of that decision drift-net fishing for salmon has not been practised in Scotland.

(1) L. R. 8 Ch. App. 650. (2) [1894] 3 Ch. 163. (3) [1900] A. C. 403.

The case of *The Duke of Atholl v. Glover Incorporation of Perth* (1) has an interesting history, which it is a matter more of historical than legal interest to trace now. It overruled two previous decisions of the Scotch Courts in *The Masters of Allan's Mortification v. Thomson* (2) and *The Earl of Wemyss v. Earl of Zetland* (3), and the decision of the Court of Session in *The Duke of Atholl v. Glover Incorporation of Perth* (1), and decided that the drift-net was a fixed net or fixed engine, and illegal. That decision, of course binds us if it applies in Ireland.

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There are distinctions between the nets used in the Scotch case, and the manner of their use, and those used in the North Channel, which were pointed out in the argument and relied on; but I am myself unable to see any solid distinction between the two cases in those respects.

The real question on this part of the case is whether drift-nets for the capture of salmon are illegal under our fishery code, or are not protected thereby. I need scarcely say that this question is of far-reaching importance in Ireland, considering that drift-nets for the capture of salmon have for over forty years at least been in use all round the Irish coast, sanctioned in a manner I shall hereafter refer to, and furnishing employment to a large class.

I shall now call attention to the material provisions of our fishery code bearing on the subject of fixed nets and fixed engines, and endeavour to trace their history. The earliest of them is the 5 & 6 Vict. c. 106, which repealed all pre-existing statutes, and furnishes a fresh legislative start.

Section 18 of the 5 & 6 Vict. c. 106 declares and affirms the right of every person legally possessed of or entitled to any several fishery in or along any estuary or part of the sea-coast, or his authorized lessee or assignee, to fix or erect within the limits and bounds of such fishery any stake-weir, stake-net, bag-net, or other fixed net for the taking of salmon; and section 19 gives the same right to every person who shall hold and occupy as tenant in fee, or in tail, or as tenant for life, or under lease for a life or lives, or for a term of not less than fourteen years unexpired, any land adjoining the sea-shore, or any estuary not within the limits of

(1) [1900] A. C. 403.

(3) 18 Rettie (4th Ser.), 126.

(2) 7 Rettie (4th Ser.). 221.



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any such several fishery. These rights are subject to various provisions, regulations, and restrictions, mentioned in those and succeeding sections. I only refer to those (18th and 19th) sections for the purpose of indicating the engines described.

The 11 & 12 Vict. c. 92 is a most important statute, owing to the mode in which it is incorporated with subsequent Acts. The 8th section enacts that after the 1st January, 1849, all engines, nets, instruments, or devices whatsoever used for the taking of salmon, trout, pollen, or fish of the salmon and trout kind, or for the taking of eels, and all fixed salmon, trout, or eel fisheries within any district or on or off the sea-coast, shall be duly licensed and rated in the manner prescribed upon payment of the prescribed licence duty.

It is this Act which provides for the appointment of conservators, elected by the persons who pay licence-duty; and (s. 13) the Board of Conservators is empowered, with the approval of the Fishery Commissioners, to fix the licence-duty for every engine, net, instrument, weir, or device set forth in the schedule used for the taking of salmon, trout, pollen, or fish of the salmon kind, and for the taking of eels, within each such district, or on or off the sea-coast thereof, and also for every such engine, net, instrument, weir, or device proposed to be used, though not enumerated in the schedule.

The schedule is important:—

SCALE of LICENCE DUTIES for each Engine, Net, Instrument, or Device used in Salmon, Trout, Pollen, or Eel Fisheries in District.

|                                                                                                   |                                                                                                         |
|---------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------|
| 1. Single salmon rods, . . . . .                                                                  | £1 0 0                                                                                                  |
| 2. Cross-lines and rods, . . . . .                                                                | 2 0 0                                                                                                   |
| 3. Snap-nets, . . . . .                                                                           | 1 10 0                                                                                                  |
| 4. Draft-nets or seines, . . . . .                                                                | 3 0 0                                                                                                   |
| 5. Drift-nets, . . . . .                                                                          | 3 0 0                                                                                                   |
| 6. Trammel-nets or draft-nets for pollen, . . . . .                                               | 1 10 0                                                                                                  |
| 7. Pole-nets, . . . . .                                                                           | 2 0 0                                                                                                   |
| 8. Other nets or similar engines<br>not named above. }                                            | Licence duties such as shall be<br>fixed by Commissioners or Conser-<br>vators as provided by this Act. |
| 9. Bag-nets, . . . . .                                                                            | £5 0 0                                                                                                  |
| 10. Fly-nets, . . . . .                                                                           | 5 0 0                                                                                                   |
| 11. Stake-nets or stake-weirs (Scoten), . . . . .                                                 | 15 0 0                                                                                                  |
| 12. Head-weir, . . . . .                                                                          | 5 0 0                                                                                                   |
| 13. For every box, crib, cruive, or drum-net in any weir<br>for taking salmon or trout, . . . . . | 5 0 0                                                                                                   |
| 14. For every gap, eye, or basket, in any weir for taking<br>eels, . . . . .                      | 1 0 0                                                                                                   |

“Drift-nets” are there referred to as a known and distinct category in 1848—nets which drift by the action of the water as distinct from those which are drawn. By section 31 any person demanding the licence and tendering the duty is entitled to get it without question, and the officer of the conservators has no right to withhold it, as we decided in *R. (Johnston) v. Coleraine Fishery Conservators* (1) in the case of draft-nets for eels. But there is a proviso—“Provided always that nothing herein contained with reference to the possession of any such licence, or the payment of the licence duty or rates under this Act, shall be construed to give or confer any right of fishing, or of using any instrument or device for taking fish, by any means or in any place which the party having or using such licence would not have possessed if this Act had not been passed, or to alter or affect the rights of any other persons.” He cannot by it fish illegally, at any prohibited time, or any place not within his right to fish in, or affect by it the rights of any other persons.

That is a natural saving, but it does not affect the question of the recognized legality of the net *per se*.

The 13 & 14 Vict. c. 88 is, I think, of importance, as containing a definition of “fixed nets” and “fixed engines,” which are defined to “extend to and include weirs, stake-, bag-, stop-, and still-nets, and all other engines or devices used for the like purposes, of whatsoever construction or materials the same may be, or however known or styled, and whether-fixed to the soil, or held by hand, or made stationary in any other way. This definition section repealed the one contained in 5 & 6 Vict. c. 106.

The Act of 1863, 26 & 27 Vict. c. 114, is a most important statute, and the 4th and 26th sections require special reference. The 4th section is as follows:—“No fixed net that was not legally erected for catching salmon or trout during the open season of 1862, shall be placed or used for catching salmon or trout in any inland or tidal waters”; and the section then declares any net placed or used in contravention of it shall be deemed a common nuisance, may be taken and destroyed, any fish taken by it are to be forfeited, and the owner is made liable to a penalty.

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I concur with the Master of the Rolls that those words, quite irrespective of anything else, are inappropriate to "drift nets." These are not a structure such as contemplated, which seems to have an apt subject in the engines mentioned in section 18 of 5 & 6 Vict. c. 106, "stake-weir, stake-net, bag-net, and other fixed net for the taking of salmon."

The 26th section is most important. It is as follows:—"The Salmon Fisheries Acts shall be construed as if in the schedule annexed to 11 & 12 Vict. c. 92, so far as relates to fixed engines, there had been inserted instead of the duties therein mentioned the duties following, that is to say—

|                                                                                       |     |
|---------------------------------------------------------------------------------------|-----|
| Bag-nets, . . . . .                                                                   | £10 |
| Stake-nets, fly-nets, or stake-weirs (Scotch), .                                      | 30  |
| Head-weirs, . . . . .                                                                 | 6   |
| For every box, crib, cruive, or drum-net in<br>any weir for taking salmon or trout, . | 10  |

and the Boards of Conservators shall not have authority to reduce or diminish the same, anything in the said Act or any other Act to the contrary notwithstanding." "So far as relates to fixed engines"—on those there is a higher duty imposed, even when they are saved under section 4 preceding.

This section is dealing with all Salmon Fisheries Acts. I attribute more weight to this 26th section than my brother Holmes in his judgment (which I have had the advantage of reading) seems to do.

But a consideration, the most important of all, remains. Since 1869 drift-net fishing for salmon by means of nets such as used in the North Channel has been practised under licences granted by conservators, and during the same period there has been in existence a great public department—now represented by the Agricultural Board—who are authorized by the legislation constituting them to make by-laws for the regulation of salmon fisheries, which are subject to an appeal to the Privy Council—a right very frequently exercised—and which appeals are heard by a judicial committee of Judges; and the by-laws regulating the use of drift-nets for salmon are considered controlled or rejected. It is open to the plaintiffs to appeal to

that tribunal to redress by a by-law any hardship which may be supposed to exist. In fact, a by-law was proposed for this fishery; but as it purported to exclude the fishermen altogether from the north channel, and there is no power to amend a by-law, this proposed by-law was rejected by the Council before which it came.

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I find in Mr. Conner's book twelve of those by-laws printed, regulating drift-nets round the Irish coast from Cork Harbour to the Foyle. They regulate the length of the nets, the distance at which they may be used apart, and the places in which they may be used. I have sat on many of those judicial committees at which by-laws were bitterly contested, but I have never heard it suggested by counsel, or any other person, that these drift-nets were illegal as fixed nets, or on any other ground. If they are now to be declared illegal, I think it must be by a decision of the House of Lords.

I think the appeal should be dismissed with costs.

HOLMES, L.J. :—

This action was brought by the Irish Society as owners of a several fishery in the River Foyle and Lough Foyle, and by their lessees, the Attorney-General for Ireland having also joined as plaintiff, for the purpose of obtaining a declaration that certain nets used by the defendants at the mouth of Lough Foyle for the capture of salmon are an unlawful obstruction to the passage of salmon to the Lough and River and a nuisance at common law to the Irish Society, their lessees, and other subjects of His Majesty, and also a declaration that the said nets are fixed engines within the meaning of the Fisheries (Ireland) Acts, and therefore illegal.

No objection has been taken to the title of the Irish Society and their lessees to a several fishery in the Foyle River, seaward as far as an imaginary line from Greencastle, in the county Donegal, to Magilligan Point, in the county Derry. The right of the Irish Society thereto has been long since established by appropriate legal proceedings; and its value for the capture of salmon is shown by the annual rent of over £5,000 reserved by the existing lease as well as by the great expenditure of the



*Appeal.* lessees in keeping up hatcheries, in protecting the salmon, and in  
 1911. watching the tributaries of the river.

*IRISH SOC.* The writ of summons named eight defendants; but of these,  
*B.* four gave a consent for judgment. This does not, however, affect  
*FLEMING* the four others who are respondents in this appeal, and who  
*AND OTHERS.* ought not to be prejudiced by an act for which they are not  
*Holmes, L.J.* responsible. I have said that the seaward boundary of the  
 Society's several fishery is a line from Greencastle to Magilligan  
 Point, where the estuary is very narrow, the distance being less  
 than a statute mile. Beyond this, there is what may be called the  
 open sea; but between Magilligan strand and the Donegal shore  
 opposite, there is the Tuns Bank. Over this bank, the water is  
 only from half a fathom to two fathoms deep; and vessels enter  
 Lough Foyle by a channel north of the bank which seems to be  
 about a mile in width and nearly three miles in length. The  
 capture of salmon complained of by the plaintiffs to which their  
 evidence was chiefly directed, was by drift-nets used in this  
 channel.

The close time for salmon in the Foyle extends from the 31st  
 August to the 15th April, but comparatively few fish are taken  
 except from about the middle of June to the last week of July,  
 and I am satisfied that during this period a considerable number  
 of salmon is taken by drift-nets in the north channel. The  
 evidence of John Patterson, one of the plaintiffs' inspectors, is  
 not challenged in so far as it relates to the number of these  
 nets and of the salmon captured thereby, as seen by him during  
 several nights in June and July, 1908, whilst he was on watch;  
 and a Billingsgate merchant proved to my satisfaction that con-  
 siderable quantities of the salmon so taken in the Foyle have for  
 years past been consigned to his firm. It is not, I think, denied  
 that the four respondents were engaged in this fishing—  
 Mr. Harold, by supplying the nets and receiving the salmon,  
 and the three others by assisting in the actual capture; and  
 the matters discussed in this court were—(1) Whether the drift-  
 nets used in the manner which I shall presently describe were  
 fixed engines within the meaning of the Fisheries (Ireland)  
 Acts; and (2) if they were not, whether fishing by them in  
 such manner was a nuisance at common law. An affirmative

answer to either question would entitle the plaintiffs to succeed; but before considering them, it is necessary to give a short description of the nets and the mode of fishing.

The length of the drift-nets has been estimated differently by different witnesses at from 600 to 1000 yards. They are made of finer twine than that used in draft-nets, with the mesh 2 inches and a half from knot to knot—that is 10 inches all round—a size capable of catching salmon weighing from six to nine pounds. The upper ropes of the net have cork floats attached, and the lower ropes lead weights; the fishing takes place at night—not for the purpose of keeping it secret from human eyes, but to prevent the salmon from seeing the nets suspended in the water. The nights in June and July are short, the darkness continuing for only four or five hours; and, as twilight falls, the nets are paid out from a boat manned by four or five men, and rowed across the north channel, either from the Tuns Bank side towards the Donegal shore, or from that shore to the Tuns Bank. When the net is fully paid out, it is attached to the boat by a rope of about 20 yards in length, the object of which is not to move the net, but to prevent it from being lost in the dark. The cork floats above and the lead weights below have a tendency to keep the nets in a perpendicular position; and if they are shot at low or high water when the tide is slack, they are almost stationary for some time. While a net is thus nearly stationary, it undoubtedly constitutes an obstruction to salmon coming from the sea; which are liable to become entangled in it, not from any movement or sweep of the net, but from the fish dashing into its meshes, which they cannot see by reason of the darkness.

According to the evidence, these nets are paid out with short distances between them, so that a fish escaping one may be entangled in another. Of course, sooner or later according to the state of the tide, the nets drift round from their position across the channel until they lie almost parallel to the shore, and thus become useless for entrapping fish; but there is always some interval before this drifting begins, and it is during this interval, when there is comparatively little motion in the nets, that the salmon entangle themselves in the meshes. The evidence is that the drift-nets are shot twice during the short summer nights. It

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requires at least a quarter of an hour to shoot them ; but the evidence is not clear as to how long they remain before they are withdrawn. It would seem to be from a quarter to half an-hour, dependent doubtless on the state of the tide. The salmon are found in the meshes of the withdrawn net. The evidence shows that their struggles to escape cause injuries to their bodies, and that when brought into the market their price is substantially less than that of fish caught by other methods. The foregoing is a description, sufficient I think for my purpose, of the mode of fishing complained of ; and I now proceed to consider the two propositions on which the plaintiffs rest their right to judgment.

Passing over for the moment the proposition that the nets used as I have described are fixed nets within the Irish Fishery Code and therefore illegal, I am not prepared to hold that, apart from their illegality, they constitute a nuisance at common law. Mr. Ronan has referred to authorities deciding that, though acts when committed by one or two persons would be innocent, such acts when engaged in, with or without combination, by a number may constitute a nuisance. I do not propose to refer to the authorities quoted by him in support of this proposition, because I think they give no assistance in the present case. I assume that a mode of capturing salmon which is neither illegal at common law nor by statute may be carried on to such an extent, in such a manner, and in such circumstances as to constitute a public, and perhaps also a private, nuisance.

The habits of salmon are guided by instincts which exist in the fish ; but which, although they have been made the subject of much study, are as yet but little understood. There is no doubt that they swim from the sea up rivers to fresh water, where they spawn towards the end of the year, and where the ova lie for three or four months before developing into the young fish that go seaward in the following year or later. It has been said that salmon have a tendency to go back to their own rivers, that fish that had once been up or down the Foyle will return there again and again if they are subjected to no exceptional treatment, but that if they meet with unusual dangers and difficulties therein, their instinct will lead them to seek other waters, thus gradually, but surely, injuring and, perhaps, ultimately destroying the fishery.

If this is what is happening in the Foyle from the drift-net fishing in the north channel, I could apply myself to the case of nuisance; but my objection is that there is no evidence to show that it is happening. There is proof that there is captured in the drift-nets a considerable quantity of salmon which would otherwise enter the estuary, and some of which would be caught by the tenants of the Society; but this must always happen where there are successive rights of fishing in either tidal or not tidal rivers, and cannot be regarded as proof of nuisance. The evidence relied on to show that there has been a falling off in the quantity of salmon frequenting the Foyle is a statement of the number caught each year for the last thirty years. The only effect that this statement has on my mind is to confirm me in the opinion, long entertained, that we have little knowledge of the habits of salmon, and of the circumstances that affect them. I find that in the Foyle, as I am sure I should also find in other salmon rivers, good years and bad years are intermingled in a way that cannot be accounted for. I cannot tell why the catch of salmon in 1908 should be 36,000, in the previous year 22,700, and in 1906, 43,000. Comparing the last six years with the six immediately preceding, there appears to have been a great increase in the number of salmon taken, although there were more drift-nets at work. The increase may be accounted for by the more effective precautions and protection mentioned by Mr. McDermott, but I cannot draw from it an inference that the drift-fishing was injurious to the fishery taken as a whole.

I come now to the critical issue in the action. Is the drift-net fishing, as carried on in the north channel, fishing with fixed nets, and, therefore, illegal? According to the evidence, drift-nets have never been used for taking salmon in England. Drift- or hang-nets were so used in Scotland previous to the year 1900, when their use for this purpose ceased in consequence of a judgment of the House of Lords to which I shall presently refer. In Ireland it has only been within a comparatively recent period that they have been so employed. It cannot, I think, be traced previous to the year 1870, when, beginning on a small scale, it has since gradually increased. It will be noted that I confine myself to the capture of salmon. I do so because drift-nets may have

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*Appeal.* been employed for catching other fish. I recently heard that  
 1911. mackerel or herring are taken by them; but, having no personal  
 IRISH SOC. knowledge on the subject, I assume that the evidence on which  
 v. I rely relates only to salmon.  
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 AND OTHERS. The decision which put a stop to drift-net fishing for salmon  
 Holmes, L.J. in Scotland is that of *Wedderburn v. Duke of Atholl*; *Duke of*  
*Atholl v. Glover Incorporation of Perth* (1). It is a most impor-  
 tant case and has an interesting history. I understand the Scotch  
 law to be, that it is illegal to capture salmon in Scotland by a  
 fixed net or other fixed engine. There are about fourteen statutes  
 of Scottish Parliaments, most of them consisting of a few lines in  
 a language which I do not understand, relating to fishing; and the  
 prohibition of the fixed-net does not depend upon a definite pro-  
 vision in any of them, but is rather an inference from several.  
 Indeed it is probable that it has always been part of the Scottish  
 common law. Whatever be its origin, there it is. It was recognized  
 in *Hay v. The Provost of Perth* (2), although it was there held that  
 the mode of fishing objected to, being in fact a reasonable improve-  
 ment on fishing by net and coble, admittedly legal, was not pro-  
 hibited. At a later date *The Masters of Allan's Mortification v.*  
*Thomson* (3) came before the Court of Session. In it the question  
 was, whether fishing for salmon by drift-nets was illegal. The  
 nets were shorter and less heavy than those used in the north  
 channel; but in their essential features, and in the mode of  
 using them, I am unable to distinguish them. The Court, con-  
 sisting of Lords Mure, Deas, and Shand, held that they were  
 not fixed engines. Then came the *Earl of Wemyss v. The Earl of*  
*Zetland* (4), where the mode of fishing was the same, and where,  
 on the authority of the previous decision, the fishing was held to  
 be legal; but Lords Young and Rutherford-Clark stated that  
 they had come to this conclusion not from an exercise of their  
 independent judgment but in deference to what had already  
 been decided. Finally we have *Wedderburn v. Duke of Atholl*;  
*Duke of Atholl v. Glover Incorporation of Perth* (1). It is, in my  
 opinion, impossible to distinguish the nets and their user as

(1) [1900] A. C. 403.

(2) 4 Macqueen, 535.

(3) 7 Rettie (4th Ser.), 221.

(4) 18 Rettie (4th Ser.), 126

proved therein on the one hand from the two previous cases I have quoted, and on the other from the case before us. The House of Lords therein decided that this mode of fishing was illegal, because it was fishing by fixed engines. It overruled *Thomson's Case* (1) and *Wemyss v. Zetland* (2), and reversed the decision of the Court of Session in *Duke of Atholl v. Glover Incorporation of Perth* (3). It is, in my opinion, a clear adjudication, binding on this Court, that the drift-nets used in the north channel are as a matter of fact fixed nets; and it follows that, unless under the Irish Fishery Code fixed nets of this kind are not illegal, our judgment must be in favour of the plaintiffs.

I am thus brought to the final question for consideration—the law in Ireland relating to the use of fixed engines for the capture of salmon. The existing Irish Fishery Code begins with 5 & 6 Vict. c. 106, which repeals a series of statutes on the same subject, the first of which, passed in the time of Edward 4, was followed by twenty-five others.

The Act of 1842 makes, therefore, a fresh start, and relieves us from the necessity of examining the previous legislation. There were other Acts passed in 1844, 1845, 1846, 1848, and 1850; but in none of these can I find any general prohibition of fixed nets for catching salmon or trout. On the contrary, fixed engines or nets are recognized as legal, although there are many provisions regulating or restricting their use. The first and, I think I may add, the only general prohibition is contained in section 4 of the Salmon Fishery (Ireland) Act, 1863—"No fixed net that was not legally erected for catching salmon or trout during the open season of 1862 shall be placed or used for catching salmon or trout in any inland or tidal waters. Any net placed or used in contravention of this section shall be deemed to be a common nuisance," and is subject to forfeiture, and the owner is made liable to heavy penalties. It is to be noted that up to 1863, and for some years later, drift-nets were not used for catching salmon or trout; and if drift-nets are fixed nets, I am unable to see how their use for that purpose at a later date is not made illegal by

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(1) 7 Rettle (4th Ser.), 221.

(2) 18 Rettle (4th Ser.), 126.

(3) [1900] A. C. 403.

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 1911. that the word "erected" is the key to the provision, and confines  
 IRISH SOC. it to some permanent engine or device; but the word fixed net  
 v. "placed or used for catching salmon or trout" must, I think, have  
 FLEMING a much wider construction. Section 1 of 13 & 14 Vict. c. 88,  
 AND OTHERS. which must be read as part of the code, contains a definition of  
 Holmes, L.J. "fixed net" or "fixed engine," as including "weirs, stake-, bag-,  
 stop-, and still-nets, and all other engines or devices used for the  
 like purposes, of whatsoever construction or materials the same  
 may be, or however known or styled, and whether fixed to the soil  
 or held by hand or made stationary in any other way."

If drift-nets, used as they are in the north channel, are fixed nets in the ordinary and material meaning of the words, there is nothing in the comprehensive definition I have quoted to give them a different or narrower construction in the Act of 1863.

It has been argued that as the Act 11 & 12 Vict. c. 92, which provides for the appointment of conservators of fisheries in Irish districts, and the granting by them of licences to fish on payment of certain duties, includes amongst such duties a duty of £3 for drift-nets in salmon, trout, pollen, and eel fisheries, this is inconsistent with such nets being illegal. As a matter of fact they were not used at that time for the capture of salmon, but if fishermen had chosen to so use them, there was no statutory prohibition of their doing so until fifteen years later. Nor can I attach weight to the further argument that the Act of 1863 leaves this licence duty as it was. The statute does not purport to enumerate the classes of nets described as fixed. This is left for decision as cases arise. For these reasons, if there was nothing else to be considered, I would be prepared to rule that the plaintiffs are entitled to judgment on the simple grounds that by the statute of 1863 fixed nets used for the capture of salmon or trout are illegal, and that, following *Wedderburn v. Duke of Atholl*; *Duke of Atholl v. Glover Incorporation of Perth* (1), I am bound to hold that the drift-nets in the north channel are fixed nets.

There remains, however, a formidable difficulty. Drift-nets

began to be used in Ireland for taking salmon in about 1870; and from that time down to the bringing of the action before us, no one seems to have regarded their use for this purpose to be illegal. The conservators of all districts have granted licences for them when applied to; and although these licences do not confer a right to fish, if no legal right exists, they show how general was the opinion that the right existed.

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Furthermore, under the Fishery Code, there has been since 1869 an Irish Public Department authorized to make by-laws to regulate fishing, subject to an appeal to the Lord Lieutenant in Council. The by-laws made under this power have been very numerous, and there have been many appeals. Several of these by-laws have been passed for the purpose of imposing conditions and restrictions on drift-net fishing for salmon, and for preventing its being carried on within certain limits. They indicate that, in the opinion of experts, the use of these drift-nets is in certain circumstances injurious to salmon fisheries; but they are quite inconsistent with the proposition that they are illegal as being fixed nets. By-laws on this subject have been brought before the Privy Council on appeal again and again. On some of these occasions I have sat on the committee hearing the appeal, and there is always an attendance of learned and experienced Judges, who have the advantage of hearing arguments from leaders of the Bar. Yet I have never known it suggested that the drift-nets as used were fixed nets. It may be said that previous to 1900 the Scottish cases to which I have referred declared the law; but there have been several by-laws and appeals within the last ten years. Indeed, one of them related to the Foyle Fishery; and I recently was a member of a committee of the Privy Council that set aside a by-law relating to the use of drift-nets in Cork Harbour.

It is with great reluctance that I should join in a judgment which would have the effect of putting an end to a mode of fishing which many Irish fishermen have pursued for forty years, and which seems during all that time to have been regarded as legal by Judges and lawyers. I am glad, therefore, that my colleagues have been able to distinguish the Irish law from the Scottish; and, although I am not convinced, I do not dissent from the conclusion at which they have arrived.



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CHERRY, L.J. :—

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The plaintiffs in this case are owners of a several fishery for salmon in Lough Foyle, and the Rivers Foyle and Bann, under a grant from the Crown conferred by certain Letters Patent of King Charles II. The defendants are a number of local fishermen who claim the right of fishing for salmon outside, but immediately adjacent to, the limits of the plaintiffs' several fishery. There is no dispute as to the plaintiffs' title or as to the limit of same, which is an imaginary line drawn from Greencastle, on the north, to Magilligan Point, on the south, at the narrowest part of the entrance to Lough Foyle. Nor is there any allegation by the plaintiffs that the defendants or any of them have fished within the limits of their fishery. Their claim is for an injunction to restrain the defendants from making use of what are known as drift-nets for catching salmon, outside the limits of the plaintiffs' several fishery, "at and near the mouths of Lough Foyle and of the River Bann respectively, both within and without the limits of Magilligan Bay." How far the claim of the plaintiffs to restrain this fishing with drift-nets extends is not very clear, either from the pleadings or from the evidence. It cannot, of course, extend beyond the limits of the territorial waters of the realm; but, in the statement of claim (paragraph 5), it is alleged to exist not only over the whole of Magilligan Bay, which is bounded by Ramore Head in the county of Londonderry, on the east, and Innishowen Head in the county of Donegal, on the west, but, "outside the said bay to the northward and north-west thereof, along the sea adjoining the coast of Donegal"; and four of the defendants who were in the habit of fishing at a place called Culdaff on the north coast of the county of Donegal, eight or ten miles west of the entrance to Lough Foyle, have given a consent for judgment, and an injunction has been issued against them. The claim of the plaintiffs, therefore, is not confined to the estuary of Lough Foyle, but extends to the open sea apparently along the whole north coast of Ireland, and the question in dispute is of the greatest importance to all those concerned in the fishing industry.

The plaintiffs allege in support of their claim for an injunction

—(1) that the use of drift-nets as practised by the defendants is a nuisance at common law ; and (2) that drift-nets, so used are “fixed engines” within the meaning of the Fisheries (Ireland) Acts, and as such illegal, except under the special circumstances sanctioned by those Acts. In order to have the first question, which is one of public right, determined in a conclusive manner, binding upon all parties, they have applied for, and obtained the fiat of the Attorney-General to the issue of the writ in his name ; but except to allow his name to be formally used as plaintiff for the purpose of having a question of public right determined, he does not take part in the litigation, which is really and substantially between the Irish Society as owners of the several fishery on the one part, and the defendants, asserting the right of the public to fish in the sea, and in all tidal waters outside the limits of a several fishery, on the other.

There is no substantial dispute as to the facts, and no very great conflict (allowing for a natural tendency to exaggerate) between the evidence of the witnesses for the plaintiffs and for the defendants. The method of fishing is described in detail by Mr. M'Dermott, the plaintiff's manager, and by several witnesses examined for the defendants. Four or five men shoot from a large row-boat, called a drontheim or whale boat, a long net, sometimes as much as 1000 yards long, which is floated by corks on the top of the water, and has lead weights attached at the bottom to keep it perpendicular when in the water. The net is usually about 15 feet wide. It is let out as quickly as possible, the far end being left free, and the boat rowing away from it across the tideway, as the net is paid out. As soon as this is done a short bit of rope is made fast to the near end of the net and attached to the boat. This is done to keep control of the net ; to prevent it being lost in the dark (as this fishing can only be carried on at night), and to enable the net to be hauled whenever it is considered expedient to do so. The net is allowed to drift in the water for a time which, according to the evidence, varies between a quarter of an hour and an hour, or an hour and a half, and is then hauled. The fish get entangled in the net by the gills or by their bodies, and are taken out when the net is boarded, by hand. The mesh, which is of the regulation

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*Appeal.* size, is large enough to let small fish through, and to catch those  
 1911. of a medium size. Very large fish are merely stopped, and it  
 IRISH Soc. is supposed driven away from the river's mouth ; their passage  
 v. up the river is therefore, as the plaintiffs allege, obstructed,  
 FLEMING and they escape capture altogether.  
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The best place for carrying on this fishing, and the place where the plaintiffs most complain of it, is in what is called the north channel, between the coast of Donegal and the Tuns Bank, at the entrance to Lough Foyle. Here, under favourable circumstances, there are large takes of fish ; and the number of salmon entering the Foyle, and so reaching the plaintiffs' fishery, is undoubtedly much reduced. But fishing can only be carried on for a comparatively short time in this channel. The season opens in April, but there is no fishing worth anything, according to Mr. McDermott, until the middle of June. From that until the middle of August it is carried on. The nets must be shot, in the dark, at low water, and in calm weather—otherwise no fish, or very few, are caught. As the nights at that season of the year are short, only four or five hours out of the twenty-four are available at any time for fishing. Two nights, Saturday and Sunday, are excluded by law ; and on other nights, the weather must be favourable, and low tide must occur at the early part of the night to allow of fishing in this channel. There is considerable conflict of evidence as to how often these conditions are fulfilled ; the fishermen say only on a few nights in the entire season ; or once every fortnight on an average, and though this may be an exaggeration, I gather from the evidence that this fishing in the north channel cannot be carried on for more than twenty or thirty nights in each year at most, and only for four or five hours upon each night.

On a favourable night, however, a large number of boats frequent this channel, and on one particular night (30th June, 1908) twenty-nine boats were observed there in the positions marked on plan No. 3, attached to the book of documents (1). As the width of the channel is only about 1200 yards, if each boat had a net out, as plaintiffs allege, right across the stream, for 1000 yards,

(1) This is the map facing p. 332.

the entire passage along the surface of the waters and for a depth of 15 feet would be blocked for the time being. The defendants, however, allege that though they endeavour to shoot the net right across the current, they are unable to keep it in this position for more than a quarter of an hour or so, as the tide, running more swiftly in the centre of the channel than at the sides, quickly carries it round "end on" to the current, and they are obliged then to haul it. Mr. McDermott, on the other hand, says, that in the experiment to be made he was able to keep the net in position for a whole hour before hauling it, but on that occasion he only caught one fish. Probably the fishermen are wiser in not allowing their nets to remain in the water so long.

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The evidence given by the plaintiffs as to the injury done to their fishery by this use of drift-nets by the defendants and others was not very satisfactory. A great deal of evidence was given of the amount of salmon caught by drift-net fishermen and consigned to various places in England and Scotland; but it remains a matter of pure speculation how many of these salmon would have found their way to the plaintiffs' waters if they had not been caught by the defendants. A table showing the number of fish caught by plaintiffs in each year from 1875 to 1908, and the number of drift-net licences issued for the same years, was relied upon by the plaintiffs, but it did not in any way establish a case of permanent obstruction to the passage of the fish. Indeed, the numbers vary so much from year to year that it is difficult to draw any inference from them. Thus, taking the first year (1875), when the number of drift-net licences issued for the Londonderry district was only twenty-three, the catch by the plaintiffs was 36,497 salmon, while in the last year for which the return is compiled (1908), although there were 109 licences issued, the catch was nearly as large, viz., 35,955; and for the year 1903, in which there were 108 licences issued, the plaintiffs' catch was 51,287 fish. It is said that figures, properly manipulated, may be made to prove anything; but I do not think that the figures in the present case very much assist the plaintiffs.

The question is, however, not whether the defendants have diminished the supply of fish to the plaintiffs' fishery, but whether they have done so by any illegal means. Every subject of the



*Appeal.* King has the right to fish in tidal waters outside the limits of a  
 1911. several fishery, and he cannot be restrained in the exercise of that  
 IRISH SOC. right merely because his fishing diminishes the amount of fish  
 v. available for others, unless his method of fishing is illegal. What  
 FLEMING is there, then, alleged to be illegal in the use of these drift-nets  
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I do not understand the plaintiffs to argue that the use of drift-nets is *per se* illegal. Indeed, it would be difficult for them to sustain such a case, for drift-nets have been in use for many years, and are constantly referred to as legal and proper modes of fishing in the Irish Fishery Acts, from the 5 & 6 Vict. c. 106, passed in the year 1842, down to the present time; and a regular scale of licence duty has been provided for them. It is alleged, however, that the excessive use of these drift-nets amounts to a nuisance at common law. If the nets are so long as practically to block up the channel of a river or estuary, or if the boats are so numerous as to entirely stop the passage of salmon up the river, then, it is argued, the Court ought to intervene and prevent by injunction such use of the nets.

So far as the case is rested upon the size of the nets used, it appears to me that it is a matter rather for regulation by by-law than for interference by the Court. By the 91st section of 5 & 6 Vict. c. 106, express power was given to the Fishery Commissioners to make by-laws and regulations, in relation to, amongst other things, "the times and places or the manner at and in which any trammel, trawl, or other net or nets, engine or engines, to be employed in the said fisheries shall be used, and also as to the description and form of nets to be used in the said fisheries, and the size of the meshes thereof"; and by the 14th section of 8 & 9 Vict. c. 108, the Commissioners are empowered "to prohibit the use, at any time or season, of any engine or device for the capture of fish which, upon inquiry had, the said Commissioners shall deem to be injurious to the fisheries."

These powers have now been transferred to the Board of Agriculture, and are frequently exercised. As a matter of fact, only a few years ago, the plaintiffs endeavoured to obtain a by-law prohibiting the use of drift-nets in the estuary of the Foyle, but the Judicial Committee of the Privy Council refused to

sanction it. This branch of the case, therefore, appears to me to be very much in the nature of an appeal to us from the action of the Privy Council—an appeal which, I need not say, we have no jurisdiction to entertain.

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The plaintiffs, however, put their case in another way. They say that, even admitting that the acts of one person, or of the crew of one boat, using a drift-net are not illegal, if a number of persons combine to fish at the same time, and in the same place, and if the joint effect of their acts is completely to block the passage of salmon up the river, then the acts of all of them become illegal, and are, in law, a nuisance, which can be restrained by the Court. So far as this contention is based upon an actual combination of the fishermen to stop the passage of the salmon, as alleged in the 5th paragraph of the statement of claim, it is not supported by the evidence. There is nothing in the evidence, so far as I can see, which indicates any combination of fishermen, except of those engaged in one boat. The crew of each boat is entirely independent of the others, and fishes for itself, each trying to get as many salmon as it can. Indeed, this argument, based upon actual combination, was expressly abandoned by the plaintiffs' counsel in this Court.

It is said, however, that the acts of a number of persons, each acting independently of the others, and without any combination or pre-arrangement, may amount to a nuisance at law, even though the act of any one by itself would not be so; and the well-known case of *Thorpe v. Brumfitt* (1) is relied upon in support of this proposition. But I do not think that the decision in that case applies where each of the acts done is an act done in exercise of a lawful right. In *Thorpe v. Brumfitt* (1) the plaintiff complained of an obstruction caused by the unloading of carts and wagons in a passage by several persons so as to obstruct his access to his yard; and the decision of the case, according to the head-note, was that "the acts of several persons may together constitute a nuisance, which the Court will restrain, though the damage occasioned by the acts of any one, if taken alone, would be inappreciable." "Suppose," says James, L.J., in giving judgment, "one person leaves a wheelbarrow standing on a way, that may cause no appreciable

(1) L. R. 8 Ch. App. 650.

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inconvenience ; but if a hundred do so, that may cause a serious inconvenience, which a person entitled to the use of the way has a right to prevent ; and it is no defence to any one person among the hundred to say that what he does causes of itself no damage to the complainant" (1). That the learned Lord Justice was referring throughout to acts not lawful in themselves, and that he considered that it would be a complete answer to the plaintiff's contention to show that each act was done in exercise of a legal right, is plain from the very next passage in his judgment, where he says—  
"The defendants seem to have a notion that they have as much right to use the passage for loading and unloading wagons as the plaintiff has to use it for the purpose of passing over it. But the practice of loading and unloading has arisen since the grant of the right of way, and *has not been continued long enough to confer an easement*. There is, therefore, nothing to prevent the plaintiff from insisting on having a right of way not interfered with by obstructions such as are complained of." The same remark applies to the other cases cited by plaintiffs' counsel. They were all cases where it was assumed that the individual act did not amount to a cause of action merely because it, by itself, caused no damage, not because it was legal, *per se*. Two "wrongs" cannot make a "right," and twenty-nine "rights" cannot, in the absence of any evidence of combination at all events, make a "wrong."

Two other grounds were relied on in the pleadings as constituting the act of the defendants a nuisance at common law. (1) That they were an obstruction to navigation and a purpresture ; and (2) that they were so destructive and injurious to the fish actually caught as to render the use of drift-nets in itself a nuisance. As to the first no evidence whatever was given that there was any obstruction to navigation ; and as to the second, although evidence was given that the fish were injured and reduced in value by becoming entangled in the nets, this point was not relied upon in the arguments before us. I do not attach very much weight to it, and I think it is a matter which, if dealt with at all, should be dealt with by by-laws made by the Board of Agriculture, who have, as I have already pointed out, ample powers to deal with

such matters. It is not a matter to be properly determined by a judicial decision, especially in the absence of any precedent for doing so. I am, therefore, of opinion that the plaintiffs have failed to establish that the mode of fishing carried on by the defendants is in any respect a public nuisance in point of law.

The second branch of the plaintiffs' case is founded entirely upon statutory provisions. It is argued that drift-nets are "fixed engines," or "fixed nets," within the meaning of the Fisheries (Ireland) Acts, and that their use is therefore prohibited by 26 & 27 Vict. c. 114, sect. 4. The decision of the House of Lords in *The Duke of Atholl v. Glover Incorporation of Perth* (1), though based upon the Scottish Acts, is relied upon in interpreting the meaning of the terms "fixed net" and "fixed engine" in the Irish code, in such a manner as to include these drift-nets.

"Drift-nets" are constantly referred to in the Irish Fisheries Acts, but never, so far as I can find, are they dealt with as being "fixed nets," nor are they included (by name at all events) in the definition of the latter term in 13 & 14 Vict. c. 88, sect. 1. They are first mentioned in the 7th section of 5 & 6 Vict. c. 106, which provides that "no person shall, at any time between sunrise and sunset, set, either in the sea or within the tideway in any estuary, any sea net for the catching of herrings, or any trammel net, or leave any drag or other net in the water between sunrise and sunset, except *stake or fixed nets* for the catching of salmon, as is hereinafter provided, and save also *seines or drift-nets* for pilehards or fish other than herrings, provided such *stake or fixed nets*, and such *seines or drift-nets*, be used at such times and places as may not be prohibited by the by-laws hereinafter mentioned." The collocation of words in this section does not support the plaintiffs' argument. "Drift-nets" are obviously contrasted with "fixed nets," instead of being comprised within the term. The sections of the same Act which provide for the use of "fixed nets," viz., sects. 18, 19, 21, and 22, invariably refer to fixed nets as nets attached to the soil; and the 38th section provides that during the close season for salmon, everyone engaged in fishing for salmon by means of "fixed engines" shall remove *from the poles or fixtures to which they shall be attached* all nets used for the purpose of taking

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 1911. "fixed nets." The 2nd section speaks of "any contrivance for  
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 v. It is true that the definition clause (section 1) of the 13 & 14 Vict.  
 FLEMING c. 88, strongly relied upon by Mr. Ronan, somewhat extends the  
 AND OTHERS. meaning of the term "fixed net," which, it is provided, "shall  
 Cherry, L.J. extend to and include weirs, stake-, bag-, stop-, and still-nets, and  
 all other engines or devices used for the like purposes, of whatso-  
 ever construction or materials the same may be, or however  
 known or styled, and whether fixed to the soil or held by hand, or  
 made stationary in any other way." But I do not think that the  
 words "held by hand" can apply to a net held by hand from a  
 boat, not anchored, otherwise every net would be a fixed net.  
 They mean, I think, "held by hand by a man standing in a fixed  
 position on the shore," or possibly in a boat moored, or at anchor.  
 It is to be noted also that, although in this definition clause four  
 kinds of nets are specified as being "fixed nets," drift-nets, though  
 mentioned in the earlier Acts, and well-known contrivances for  
 fishing, are not so mentioned.

Notwithstanding the wide terms of the definition of "fixed net" in the 1st section of 13 & 14 Vict. c. 88, the subsequent Acts continue to refer to fixed nets as nets in some way attached to the soil. The general prohibition section, 26 & 27 Vict. c. 114, section 4, forbids the use of any fixed net "that was not *legally erected* for catching salmon or trout during the open season of 1862." I cannot think that this section was intended to apply to "drift-nets." They cannot be said to be "erected" anywhere; and if it was intended to prohibit them, one would certainly expect that some reservation of existing rights would have been made to those who had used them "in the open season of 1862" in the same manner as the rights of owners of fixed nets "legally erected" at that time were preserved. But if drift-nets are not included in the prohibition contained in this section, the plaintiffs' case must entirely fail on this branch of their argument.

A subsequent section of this Act (26 & 27 Vict. c. 114) appears to me, however, to be conclusive proof that "drift-nets" are not included within either the term "fixed net" or "fixed

engine," which terms are everywhere used throughout the code as equivalent. The 26th section provides that the schedule containing a scale of licence duties for all kinds of nets, provided by 11 & 12 Vict. c. 92, shall be amended *so far as relates to fixed engines*. It then sets out a new scale of duties for these, and enumerates the last six of the items set out in the schedule. Drift-nets are not included among these, but are specified among the first eight items, comprising all movable nets, for which the old scale of duties is allowed to remain. Reading the schedule and the amending section together, it is therefore perfectly plain that the schedule is divided into two parts, the first part referring to draft-nets (or seines), *drift-nets*, trammel-nets, and pole-nets, and (item 8) "other nets, or *similar engines* not named above," being those which are considered not to be fixed, and which are therefore liable to one scale of duty, and the second part referring to bag-nets, fly-nets, stake-nets, and drum-nets, which, being "fixed nets," are classified with weirs and other fixed engines, and charged a higher scale of duty. It appears to me almost impossible to argue that "drift-nets," specially enumerated in this schedule amongst the classes of nets to which no one would think of applying the term "fixed," and omitted from the enumeration of nets for which as "fixed engines" an increased scale of duties is provided by the amending section, are really after all "fixed engines."

The plaintiffs here rely very much upon the decisions of the House of Lords in the cases of *Hay v. Lord Provost of Perth* (1), and *Duke of Atholl v. Glover Incorporation of Perth* (2). The mode of fishing by what are called "hang-nets," held to be illegal in the latter case, undoubtedly bears a strong resemblance to the mode adopted by the defendants here. Still there is a difference. According to the Irish practice the fish is caught by becoming entangled in the net. It remains so until the net is hauled on board the boat, when the fish is taken out of the net by hand.

The method of capturing fish in Scotland is thus described by Lord Macnaghten:—"The net, as it drifts, is attended by a man in a boat. When the attendant judges from the motion of the

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(1) 4 Macq. 535.

(2) [1900] A. C. 403.

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corks that there is a fish in the net, he goes and either lifts up a bit of the net, and tosses the fish into the boat, or secures his catch by a gaff." It is clear from the next passage in the judgment that the learned Law Lord considered this method of capture a material fact in the case, for he goes on to say:—"Apart from the use of the gaff, which is apparently illegal when used as auxiliary to net-fishing, it seems to me to be clear that this mode of fishing is not fair net and coble, and something substantially different from it."

This was not only the *ratio decidendi* of Lord Macnaghten's judgment. It appears to have been also the main point upon which Lord Brampton relied as the basis of his decision.

"If I had before me," says he ([1900] A. C., at p. 429), "simply the evidence of Maxwell, one of the defenders' witnesses, I could come to no other conclusion than that the object of the hang-net was not to capture fish in the ordinary mode as by net and coble, *but to impede the progress of the fish* whether going up or down the river, *to keep them on that side of the net they might chance to be approaching*, until they became unable to escape from the gaff, *whether they previously had become entangled or not.*"

The fishing in the present case is carried on entirely by night, so that this method of capture, without hauling the net, cannot be resorted to, for want of light, even if it were ever possible, which I greatly doubt, in the open sea, or wide estuary of Lough Foyle. The decision, therefore, of the *Duke of Atholl's Case* (1) was not based upon the same state of facts as is proved to exist here.

Undoubtedly, however, the general principles laid down by Lord Westbury in *Hay v. Lord Provost, &c., of Perth* (2), and by Lord Halsbury, Lord Davey, and Lord Brampton in *The Duke of Atholl's Case* (1), if intended to be a general statement of the law outside of Scotland, would govern this case, and would constrain us to reverse the judgment of Meredith, M.R., and decide in favour of the plaintiffs. But I do not think that they are so intended. They appear to me to be a short summary of the old Scottish Salmon Fishery Acts, as interpreted by a number of judicial

(1) [1900] A. C. 403.

(2) 4 Macq. 536.

decisions, rather than a statement of the common law. As such, of course, they have no binding force in Ireland, and cannot affect our decision in the present case. I have no knowledge whatever, I regret to say, of the Scottish Fishery code, but I never heard it suggested that in Ireland net-fishing for salmon is illegal unless the net is kept incessantly in motion. This, however, appears, from the judgments of Lords Davey and Brampton in *The Duke of Atholl's Case* (1), to be the law of Scotland.

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One other case relied upon by the plaintiffs, *The Dunelm* (2), is not, in my opinion, an authority in their favour at all. It was decided in that case that a trawler going two and a half knots through the water, and four and a half knots over the ground, was not "stationary" within the meaning of the regulations for preventing collisions at sea. The Court, however, appear to have assumed that a vessel might be "stationary" within the meaning of the regulations, though not at anchor or moored in any way, and the appellants rely upon the judgments of the Court of Appeal, as helping their argument by reason of this assumption; but this interpretation was based upon the special terms of the regulations, and neither the decision of the case, nor the judgments in the Court of Appeal, can be relied upon as establishing that a net floating with the tide, held merely by a rope from a boat, and not anchored or attached to the soil in any way, is "fixed" within either the ordinary signification of the English language or the special provisions of the Irish Fishery code.

For these reasons I am of opinion that the decision of Meredith, M.R., dismissing this action was right, and should be affirmed.

Solicitors for the plaintiffs: *B. H. Lane & Co.*

Solicitor for the defendants, Harold, Reynolds, Barr, and M'Dermott: *James E. O'Doherty.*

W. G.

(1) [1900] A. C. 403.

(2) 9 P. D. 164.



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K'EOGH v. K'EOGH.

*Will—Construction—Gift to wife “for life for her own maintenance and the maintenance and advancement in life” of testator’s children—Right of adult children to maintenance during life of widow.*

A testator gave all his property to trustees upon trust to permit his wife to occupy the mansion-house during her life, and, after payment of outgoings, to pay the net rents and profits of the property to his wife, “for life for her own maintenance and the maintenance and advancement in life” of his children, and, after his wife’s decease, in trust for his eldest and other sons in tail male with further remainders, and, in the event of his wife predeceasing him or dying during the minority of his children, testator made further provision for the maintenance and advancement of his children until their attaining the age of twenty-one years or marrying, and testator made further provision for his younger children.

*Held*, that the wife took the income subject to a trust for the maintenance and advancement of the children during the mother’s lifetime so long as they should require same.

The children other than the eldest son being provided for, the eldest son, the tenant in tail male in remainder, subject to his mother’s life interest, who had married, and, at the desire of his mother, had left the parental home, but who was unprovided for, issued a summons to determine what provision should be made for him out of his mother’s income.

The Court directed the inquiry asked for.

SUMMONS by the eldest surviving son of John Henry K’Eogh, who died on the 22nd April, 1888, to determine whether the widow took the income of the testator’s property for her life subject to a trust for the maintenance and advancement of the plaintiff and the other children of the testator, and what provision should be made under the said trust for the plaintiff and the other children.

By his will, dated 18th February, 1876, John Henry K’Eogh left all his property, real and personal, to trustees upon trust to permit his wife Frances De Rinzy K’Eogh, otherwise Richards, to occupy the mansion-house at Kilbride, together with the demesne, offices, gardens, and pleasure grounds in and about the same during her life, and after payment of the incidental expenses

and outgoings, to pay the net rents and profits of his property, including the said mansion-house and demesne, to his said wife for life for her own maintenance and the maintenance and advancement in life of his daughter by his former marriage, and of the child or children of his said wife, Frances de Rinzy K'Eogh, born during his life or within nine months after his decease, and, after her decease, in trust for the eldest son of the said Frances de Rinzy K'Eogh, born as aforesaid, for life, with remainder to his first and other sons in tail male, with remainder, in default of such issue, to the second, third, and other sons of the said Frances de Rinzy K'Eogh, born as aforesaid, successively in tail male and, in default thereof, with remainders over. The will further provided and directed that, in default of any male issue born as aforesaid, who should attain the age of twenty-one years, the rents and profits of his property should, after the death of his wife, be applied by his trustees for the maintenance and advancement of his daughters until the eldest should attain the age of twenty-one years. The will further provided that the testator's Kilbride estate should be charged with a perpetual annuity of £200 per annum as a provision for his daughter by his first marriage, and his younger children by his second marriage, to be divided equally between them, or the whole to the survivor, or, in the event that the elder should, under the limitations, become entitled to the estate, then the said annuity should go equally to the younger children, with provisions for redeeming the said annuity. The testator appointed his wife, Frances de Rinzy K'Eogh, and his brother-in-law, Captain Frederick William Richards, as guardians and guardian of the person and fortune of such of his children as at the time of his decease should be under the age of twenty-one years, his said wife to have the sole care and management of his children during her life and after her decease his said brother-in-law to have the care and management of his said children.

At the date of the death of the testator the eldest son was Hugh K'Eogh. Hugh K'Eogh died in 1899 intestate without ever having married, and the lands vested in the plaintiff as tenant in tail in remainder, subject to his mother's life interest under the terms of the will, as the second eldest son.

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In June, 1905, Frances de Rinzy K'Eogh lodged an originating application in the Court of the Irish Land Commission for a sale under the Land Purchase Acts of the lands of which she was tenant for life under the said will. The total purchase-moneys advanced in respect of the tenanted lands being insufficient to discharge the incumbrances on the estate and the redemption of superior interests, the demesne lands were sold to the Land Commission and re-invested in her pursuant to section 3 of the Irish Land Act, 1903, subject to an annuity of £203. By an order made on the allocation of the proceeds of the said sales the perpetual annuity of £200 charged on the lands as a provision for younger children was redeemed at the sum of £4000 and paid out to the younger children entitled to the same.

By an order of the Irish Land Commission, dated 1st November, 1909, it was ordered, pursuant to the provisions of section 3 (4) of the Irish Land Act, 1903, that the demesne lands re-vested in Frances de Rinzy K'Eogh, subject to the annuity of £203, should devolve in accordance with the terms of the will of John Henry K'Eogh, and of the marriage settlement of the plaintiff, made on his marriage in 1903.

The plaintiff attained the age of twenty-one years in 1897. The plaintiff, subsequent to his marriage in 1903, resided with his wife in his mother's house at Kilbride, but latterly had been requested by his mother to reside elsewhere. The plaintiff had received a good education, but had at present, beyond his wife's small income, no source of income. The net income of his mother, Frances de Rinzy K'Eogh, was stated to be, after deduction of all out-goings, £160 per annum.

*H. Wilson, K.C.* (with him *Donaldson*), for the plaintiff:—

The words of the gift to the widow create a trust during the lifetime of the widow for the benefit of the children of the testator requiring maintenance and advancement in life: *Longmore v. Elcum* (1); *Berry v. Briant* (2); *Carr v. Living* (3); *In re Booth* (4).

(1) 2 Y. & C. 363.

(2) 2 Dr. & Sm. 1.

(3) 33 Beav. 474.

(4) [1894] 2 Ch. 282.

*Jellett, K.C., and H. R. Poole*, for the trustees of the will :—

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The question here is, whether the clause in the will is an imperative direction by the testator, or whether the words simply indicate the testator's intention or the motive or purpose of the gift. In the cases cited the Court found a direction directing the thing to be done, in other words a trust. The testator's idea was that all should reside in the mansion-house, not that the widow out of her slender income should maintain separate establishments for the children. The tendency of modern decisions is to hold gifts such as that in the present case to be absolute gifts to the widow : *Bond v. Dickinson* (1); *Mackett v. Mackett* (2). Where the gift is given to accomplish an object there is no trust : *Thorp v. Owen* (3). Where the words are merely expressive of the motive for the gift, no trust arises : *per Walker, L.C., in O'Connor v. Butler* (4).

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Assuming a trust, is a married son living in his own house entitled to the benefit of such a trust ? *Staniland v. Staniland* (5). The obligation does not continue in the case of married children : *Massey v. Massey* (6). The children lose their claim if they become forisfamiliated or maintain a separate establishment : *Lewin on Trusts*, 1891 Edition, p. 145. *Prima facie* it applies only to the children living with the mother : *Carr v. Living* (7). Here the widow has benefited the plaintiff by buying back the demesne, and paying instalments for the benefit of the inheritance. The whole scheme of the will seems only to contemplate maintenance till twenty-one ; after the widow's death the trustees are only to maintain up to twenty-one. The demesne was to go to the widow for her own use, and the profits of the demesne in any event are not applicable to the trust. The testator directed that his wife should have the sole care and management of his children during her life. Where such a wide discretion is given to the widow the Court should lean to a construction which will effectuate the testator's purpose.

(1) 33 L. T. (N. S.) 221.

(2) L. R. 14 Eq. 49.

(3) 2 Hare 607.

(4) [1907] 1 L. R. 507.

(5) 34 Beav. 536.

(6) [1873] W. N. 76.

(7) 28 Beav. 644.



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Donaldson, in reply :

The cases cited on the other side have been overruled by *In re Booth* (1), and are distinguishable from the present case. Here, the setting up of a separate establishment by the plaintiff was the act of the widow : see her affidavit as to the circumstances. If we are wrong, then the eldest son is the only one out of all the children to starve till he gets the estate. "Maintenance and advancement" are stronger than "maintenance and education" : Theobald on Wills, p. 437, sets out three classes of maintenance cases—(1) where the donee is merely a trustee: *O'Connor v. Butler* (2); (2) where the donee is absolute owner, and the maintenance is merely a motive : *Bond v. Dickinson* (3) and *Mackett v. Mackett* (4) belong to this class ; (3) where the gift is subject to the obligation to maintain. The present case belongs to the third class. *Thorpe v. Owen* (5) is distinguished by the language of the will. Here the scheme of the will is that the wife should maintain any of the children requiring maintenance during her life. On her death, if the children are of age, they are all provided for, the eldest son taking the estate, and the younger children a perpetual annuity. If the eldest son is not of age on his mother's death, an express provision is made for the maintenance of the younger children during his minority.

Ross, J. :—

I am of opinion that the authorities are contradictory. I must, therefore, to the best of my ability, make out the meaning of the present will. The question is whether the words of the will give the property to the widow absolutely unfettered by a trust, or do they give it to her subject to a trust. [His Lordship read the material clauses of the will.] What was the necessity for the use of the words "for her own maintenance and the maintenance and advancement in life of the children"? It is said they are merely words of explanation? Where was the need for explanation?

(1) [1894] 2 Ch. 282.

(2) [1907] 1 I. R. 507.

(3) 33 L. T. (N. S.) 221.

(4) L. R. 14 Eq. 49.

(5) 2 Hare, 607.

The primary object of a will is the disposition of property, not to show the motives of the testator. The words I have read were, I think, intended to be operative. I am, therefore, of opinion that a trust was created not only in favour of the widow's own children, but also in favour of the child by a former marriage, and that the trust must be enforced.

Ross, J.  
1911.

K'Eogh  
v.  
K'Eogh.

On the second branch of the case I had considerable doubt as to whether, when the children went out into the world, their maintenance should continue. The word "maintenance" occurs twice. It first applies to the widow herself. It must bear the same sense in each place. Her maintenance lasts for her own life, so must theirs. I hold that the children are entitled to support so long as they require it. This is not the case of one member of the family leaving his home to push his fortune. The plaintiff has not left of his own accord. He has left because his mother did not desire him to stay in the house. The other children having been sufficiently provided for, and having waived any claim for maintenance, I direct an inquiry as to what provision should be made by Frances De Rinzy K'Eogh out of the income of the property for the maintenance of the plaintiff. I would suggest £30 per annum as a sum fair and proper under the circumstances to be allowed to the plaintiff, and accepted by him without the expense of an inquiry.

Solicitor for the plaintiff: *Paul A. Brown.*

Solicitors for the defendants: *Edwards & Good.*

D. M. S.

*Barton, J.*  
1911.

MURPHY v. WILLCOCKS.

May 1. *Practice—Injunction—Restraining order—Attachment—Wilful disobedience—Trespass—No limit of time in judgment—Indorsement—Order XLI, Rule 4.*

The Court granted an injunction restraining the defendant in the action from residing in the house of the plaintiff. No time was limited by the judgment within which the terms of the injunction were to be complied with, nor was there any memorandum of indorsement on the copy of the judgment served on the defendant as provided for by Order XLI, Rule 4.

The defendant, in disobedience to the injunction, continued to reside in the house of the plaintiff.

*Held*, that Order XLI, Rule 4, did not apply to a prohibitive order of the kind, and that the defendant should be attached for his disobedience.

MOTION.

Under the will of her former husband the plaintiff was entitled to the dwelling-house known as "St. Lawrence" and certain lands at Chapelizod, in the county of Dublin; and the defendant, who was the son of the marriage, was entitled to an annuity of £200 a year payable out of this property. The plaintiff married her present husband, J. B. Murphy, in 1898. She resided in "St. Lawrence" with her husband. The defendant also lived with them in this house until 1908. In that year, owing to his violent conduct, he was ejected, but he was afterwards allowed to come back. It was alleged that subsequently the defendant was guilty of threatening and insulting language and conduct towards the plaintiff, her husband, and servants; that he was disorderly in his habits, and had interfered with the management of plaintiff's property. The defendant refused to leave the dwelling-house of "St. Lawrence," and the plaintiff brought an action claiming an injunction restraining the defendant from breaking and entering the dwelling-house and premises.

On March 30th, 1911, a motion was made for judgment in default of defence, and the Court granted the injunction asked for

against the defendant; and on the 5th April, 1911, a copy of this judgment was served upon the defendant personally. He nevertheless insisted upon entering the house and continued to make his residence there.

*Barton, J.*  
1911.  
*MURPHY*  
v.  
*WILLCOCKS.*

The solicitors for plaintiff wrote twice requesting defendant to leave the house, but he did not reply to their letters.

The judgment granting the injunction did not limit any time within which the defendant was to comply with its terms, nor did the indorsement on the copy judgment served on the defendant contain any memorandum to the effect provided for by Order XLI, Rule 4.

The plaintiff applied "that she be at liberty to issue a writ of attachment against the defendant for his contempt in continuing to break and enter the dwelling-house of the plaintiff known as 'St. Lawrence,' Chapelizod, in the county of Dublin, and in continuing wilfully to trespass thereon or therein and make the same his residence against the wishes of the plaintiff, in disobedience of the judgment dated the 30th March, 1911, and that the defendant may be ordered to pay to the plaintiff her costs of and incident to the issuing of the said writ of attachment, or for such other order as to the Court shall seem fit."

*F. W. Price*, in support of the application :—

Order XLI, Rule 4, does not apply to a restraining judgment or order, and so it is not necessary in order to ground an application for an attachment that there should be any memorandum in accordance with the terms of that rule indorsed upon the copy of the judgment or order served on the defendant. It is a restraining order which never states any limit of time. Any notice of the injunction is sufficient. Otherwise a defendant against whom an injunction has been granted might go and do the very thing that the injunction restrains him from doing : see *Selous v. The Croydon Rural Sanitary Authority* (1), decided on the analogous English Order XLI, Rule 5.

The judgment does not limit any time for obeying the injunction and *ex necessitate rei* no time could be limited by



*Barton, J.* any memorandum or indorsement on the copy served on the  
1911. defendant.

*MURPHY* On the facts disclosed, a clear case is made for an attachment.  
*v.*

*WILLCOCKS.*

The defendant was not represented.

BARTON, J. :—

Order XLI, Rule 4 (English Order XLI, Rule 5), has no application to prohibitive orders like the present. A writ of attachment must issue, and the defendant must pay the costs of the motion.

Solicitors for the plaintiff: *W. G. Bradley & Son.*

R. W. L

IN RE THOMASINE ELEANOR SWAN, DECEASED; REID  
v. SWAN.

(1910. No. 608.)

Barton, J.  
1911.

Feb. 21.  
April 20, 21,  
26.

*Will—Construction—Testamentary power—"Relatives" of deceased person—  
Default of appointment—Tenant for life surviving donee of power—Time  
for ascertaining class.*

Appeal.  
June 9, 12,  
29.

A widow by her will left her residuary estate in trust for her son J. for life, and after his decease in trust for his children, and in case of no such issue (which event happened) in trust to pay the income to her daughters M. and B. and her grandson W. for their lives in such shares as J. should appoint, and on their respective deaths the principal to be paid and transferred to such relatives of J.'s father, S. (the testatrix's late husband), as J. should by will appoint.

J. died without making any appointment, and was survived by W., who was the last surviving tenant for life.

*Held*, that on the death of W. the persons entitled to the testatrix's residuary estate were the statutory next-of-kin of S. living at the death of J.

ADJOURNED SUMMONS raising certain questions under the will of Thomasine Eleanor Swan, widow, deceased.

The testatrix, by her will dated the 24th May, 1879, after certain specific bequests, gave all her real and personal estate to her executors and trustees, viz., Benjamin Bousfield Swan, Joseph Swan (her son), and Josephine Browne (her daughter), in trust, to pay to Josephine Browne the dividends on one thousand Midland Great Western Railway of Ireland Railway Stock for her life, and after her decease, upon trust, to pay said one thousand shares (*sic*) among her children or remoter issue as she should by deed or will appoint, and in default of appointment equally among them, and if no such children or issue, in trust for Joseph Swan for life, and after his decease for his child or children as he should by deed or will appoint, and in default of appointment equally, and in default of any children of her said son, Joseph Swan, same was to form part of testatrix's

*Barton, J.* residuary estate; and as to the residue of said dividends or  
 1911.  
 KEID  
 r.  
 SWAN. annual proceeds, and as to the principal moneys and securities,  
 in trust for Joseph Swan for life, and after his decease upon trust  
 for his children or remoter issue, as he should by deed or will  
 appoint, and in default of appointment upon trust for his child,  
 children, or remoter issue, who should survive him, in equal  
 shares, the child or children of a deceased child to take his  
 or their parents' shares, and in case of no such issue of the said  
 Joseph Swan him surviving the will proceeded: "The dividends,  
 interest, and proceeds of said principal moneys and securities  
 are for their natural lives to be paid in such shares to my  
 daughters Mrs. Mack and Mrs. Browne, and my grandson,  
 William Swan, as said Joseph Swan, shall appoint, and on  
 their respective deaths such principal moneys and securities are  
 to be paid and transferred to such relatives of his late father,  
 as my son, Joseph Swan, may by his will direct and appoint,  
 and I appoint my said son my residuary legatee and devisee."  
 The testatrix made a codicil which did not affect the depositions  
 hereinbefore mentioned. The testatrix died on the 21st June, 1880,  
 and probate of her will and codicil was granted to Joseph Swan  
 on the 27th August, 1880, reserving the rights of the other  
 executor and executrix.

Benjamin B. Swan died without obtaining probate, and probate of the testatrix's will was granted to Josephine Browne on the 7th May, 1902; Joseph Swan died without issue on the 16th December, 1902; Mrs. Mack died on 11th November, 1902; William Swan, the testatrix's grandson, died on the 7th May, 1910.

Joseph Swan made his will, dated the 27th June, 1880, by which he bequeathed to his wife, Kate Swan, one of the defendants, all his real and personal property, and appointed her sole executrix, and she proved his will. Joseph Swan did not exercise the power of appointment given to him by the will of Thomasine Eleanor Swan. Josephine Browne survived Joseph Swan, and appointed the plaintiffs her executors, by whom her will was proved. She died before William Swan, the grandson of the testatrix. Mrs. Kate Swan claimed payment of the residue of the estate of Thomasine E. Swan as personal representative and universal legatee of Joseph Swan, and other claims were made by the next-of-kin of

William Swan, husband of the testatrix. Mrs. Kate Swan's claim was not persevered in, and the real question which presented itself for decision was the time at which the next-of-kin of the said William Swan, the husband of the testatrix, were to be ascertained.

*Barton, J.*  
1911.

REID  
v.  
SWAN.

The plaintiffs, as executors, having commenced proceedings by summons to determine these questions arising on the testatrix's will, the plaintiff, Barbara Lucretia Swan, applied by summons, which was adjourned into Court, to ascertain who were the class of relatives of William Swan, the deceased husband of the testatrix, who became entitled to her estate. Barbara Lucretia Swan was one of the next-of-kin at the death of Joseph Swan, the donee of the power.

*J. H. Russell*, for the plaintiffs.

*Fitz Gibbon, K.C.*, and *H. Morgan Byrne*, for Barbara L. Swan.

*S. L. Brown, K.C.*, and *Donaldson*, for the executors of John Henry Mack.

*Harrison, K.C.*, and *E. S. Murphy*, for the representatives of William F. B. Swan (grandson of testatrix).

*Samuels, K.C.*, and *J. Craig Davidson*, for the defendants, Joseph Percival Swan and Francis P. Swan, and other next-of-kin of William Swan, testatrix's deceased husband, who were living at the death of the surviving tenant for life.

*Chaytor, K.C.*, and *Poole*, for Emily B. Swan, personal representative of a next-of-kin alive at the death of the donee of the power, but who pre-deceased the last surviving tenant for life.

BARTON, J.:—

Mr. Samuels and Mr. Chaytor have argued that the words "relatives of his late father" should be construed not in their ordinary meaning, but as excluding those "relatives" of his late father who were also relatives of the testatrix, his wife; in other words, as excluding all his late father's descendants, whether children or grandchildren. In support of this contention, counsel rely upon the way in which testatrix refers in the will to her children and grandchildren as "my," and makes three of them tenants for life



Barton, J.  
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of the income of the residuary estate in such shares as her son may appoint. I agree with Mr. Chaytor that descendants should be excluded from the term "relatives," if testatrix has made her intention to that effect clear. I also agree with Mr. Chaytor that I should apply the rules of construction laid down by Lord Halsbury in *In re Joddrell*; *Joddrell v. Seale* (1). I do not know what the testatrix meant, except by the words she used. I can only see her mind through the instrument, meaning thereby of course the whole of the instrument. There is some colour of probability for the view put forward by Mr. Samuels and Mr. Chaytor. I must, however, point out that if speculation of that kind as to probability is to be indulged in, something might be said on the other side. There was a grandchild not mentioned in the will. There was the possibility of other grandchildren. Is it probable that the testatrix meant to prohibit any benefit being conferred upon such relatives of her husband in favour of remoter relatives? This is not a case where it is contended that the word "relatives" is used to "describe" child or children as in a *dictum* which was cited—but to *include* them. It is said that some significance should be attached to the words "relatives of his late father." Certainly, they should receive all the significance to which they are entitled. May not the testatrix merely have meant to exclude relatives of her own, who were not connected with her husband save through her? At all events, I can see no sure or sufficient grounds for departing from the primary meaning of the word "relatives," and I cannot yield to the contention that the nearest and most direct "relatives of his late father" were intended to be excluded from the class of objects of the power.

Mr. Samuels, in the next place, contended that an intention was shown in the will that the capital should be kept intact until the death of the survivor of the three tenants for life. It seems to me, however, that a contrary intention is expressed by the direction that the principal moneys and securities are to be transferred upon their "*respective deaths*."

The result is, that this is a case to which the rule applies which was stated by Chitty, J., in *Wilson v. Duguid* (2) at p. 251.

(1) 44 Ch. D. 590.

(2) 24 Ch. D. 244.

There is a power to appoint among relatives. The donee did not exercise the power or right of selection. If he had done so, I assume that he might have appointed to any relatives. But, in modelling the trusts to be applied in default of appointment, the Court is under the necessity of adopting some fixed rule. That rule is to confine the class of relatives to next-of-kin according to the statute.

The remaining question is, at what date the class of next-of-kin is to be ascertained? This is a case of a testamentary power of appointment. I look at the will, and I come to the conclusion that the testatrix must have contemplated and intended that the class of objects of the power should be ascertained at the death of the donee of that testamentary power. I cannot attribute any other intention to a person who gives to a particular person a testamentary power of selection or appointment of this kind among relatives. It is contemplated that it will be exercised by the will of the donee of the power, and will operate at his death.

*White's Trusts* (1) and *Phene's Trusts* (2) were not cases of a testamentary power of appointment, but of administrative or quasi-administrative trusts intended to be exercised by trustees or executors for the *personal enjoyment* of a particular class of persons. The latter point was taken in *Wilson v. Duguid* (3), at p. 251, by Chitty, J. A similar observation might, I daresay, be applied to *Attorney-General v. D'Oyley* (4). It is sufficient, however, to say that those cases are distinguishable from the present case. It seems to me that the circumstance that the power was testamentary makes the death of the donee of that power the period which should be taken to have been contemplated by the testatrix as the latest date for ascertaining the class of objects. If so, the Court, in applying its fixed rule, should take that date.

The case most like the present is *Birch v. Wade* (5), referred to on this point in Sugden on Powers, at p. 662. I cannot distinguish the present case from that case. I think I am acting in accordance with the provisions of the will, and that I am not

*Barton, J.*  
1911.

RETD  
v.  
SWAN.

(1) Johns. 656.

(2) L. R. 5 Eq. 346.

(3) 24 Ch. D. 244.

(4) 4 Vin. Ab. 485; 2 Eq. Cas. Ab. 194.

(5) 3 V. & B. 198.

*Barton, J.* departing from the authorities, in holding that the date of  
 1911. ascertainment of the class of the next-of-kin should be the  
 REID death of the donee of the power.  
 v.  
 SWAN.

W. M'G.

*Appeal.*

Joseph Percival Swan appealed (1).

June 9, 12.

*Ronan, K.C., and Samuels, K.C.* (with them, *J. Craig Davidson*),  
 for the appellants:—

As Joseph Swan did not exercise his testamentary power of appointment, the persons to take in default of appointment are the next-of-kin of his father, William Swan. We do not quarrel with the order of Barton, J., on this point. But the question is, when is the class to be ascertained? But Joseph Swan might have appointed to relatives who were not next-of-kin. Even supposing that if he had exercised the testamentary power conferred on him, the appointees would have taken vested interests in their appointed shares at his death, as the persons to take in default, namely, next-of-kin, and none other would be a different class, there is no reason why they should be ascertained at the same point of time. There were three preceding life interests in Mrs. Mack, Mrs. Browne, and William Swan, amongst whom Joseph Swan had merely a power of apportionment. We say the time for ascertaining the next-of-kin was the death of the surviving tenant for life, William Swan, who died on 7th May, 1910: *Re White's Trusts* (2); *Birch v. Wade* (3); *D'Oyley v. Attorney-General* (4); *Wilson v. Duguid* (5); *In re Phene's Trusts* (6); *Pearce v. Edmeades* (7); *Doe d. Gorges v. Webb* (8); *Re Nash, Prall v. Bevan* (9); Farwell on Powers, 2nd ed., 504; Williams on Executors, 9th ed., vol. 2, 1329. The will directs that on the

(1) In the Court of Appeal before THE LORD CHANCELLOR and LORDS JUSTICES HOLMES and CHERRY.

(2) Johns. 656.

(6) L. R. 5 Eq. 346.

(3) 3 V. & B. 198.

(7) 3 Y. & C. Ex. 246.

(4) 4 Vin. Abr. 485, pl. 16, 2 Eq.

(8) 1 Taunt. 234.

Cas. Abr. 194, pl. 15;

(9) 71 L. T. (N. S.) 5.

(5) 24 Ch. D. 244.

deaths of the tenants for life the principal moneys and securities "are to be paid and transferred" to the objects of the power. This contemplates that the objects are to be then living and capable at that time of accepting payment or transfer.

*Appeal.*  
1911.

REID  
v.

SWAN

The Lord,  
Chancellor.

*Harrison, K.C., and Fitz Gibbon, K.C. (with them, Poole), for the respondents:—*

The time for ascertaining the next-of-kin of William Swan, the husband of the testatrix, was the death of Joseph Swan, the donee of the power of appointment. This was a testamentary power, and if he had exercised it, the appointees living at his death would have taken vested interests. The persons to take in default of appointment must be held to take vested interests at the same time. The law favours early vesting. As to authorities, few have any direct bearing on the question here: *Birch v. Wade* (1) is, as Barton, J., observed, the case which most nearly resembles the present, and is a direct authority in our favour: *Re White's Trusts* (2) and *In re Phene's Trusts* (3) are quite distinguishable. Neither of these was a case of a testamentary power. In both personal enjoyment by the appointee was contemplated, and they were on that ground distinguished by Chitty, J., in *Wilson v. Duguid* (4). [Counsel cited *Dunlop v. Greer* (5); *Bullock v. Downes* (6); *Re Caplin's Will* (7); *Gundry v. Pinniger* (8).]

THE LORD CHANCELLOR:—

June 29.

[His Lordship read the provisions of Mrs. Swan's will, *ante*, p. 405, and continued]—Joseph Swan gets a life interest, and he has a power by deed or will to appoint to children or grandchildren who survive him. If he should die without issue, there are interests for their lives given to Mrs. Mack, Mrs. Browne, and the grandson, William, Joseph Swan being given a power of apportioning the shares amongst them; and then there comes a power to Joseph Swan by will to appoint the residuary estate to the relatives of his late father.

(1) 3 V. & B. 198.

(2) Johns. 656.

(3) L. R. 5 Eq. 346.

(4) 24 Ch. D. 244.

(5) [1899] 1 I. R. 324.

(6) 9 H. L. C. 1.

(7) 2 Dr. & Sm. 527.

(8) 14 Beav. 94.



*Appeal.*

1911.

KRID

v.

SWAN.

The Lord  
Chancellor.

It will be observed that none of the three whose estates are interposed before this power given by will to Joseph has any power of appointment given to them. But Joseph Swan is donee of a testamentary power. In the absence of all authority, what is the natural construction of the clause, applying some principles which are beyond dispute?

No appointment having been made by Joseph, a trust arose at his death for the statutory next-of-kin of his father. The estates which they take are those which could have been appointed if an appointment were made. It was only testamentary, so that it was at his death their interests would arise, and I fail to see how their interests in default of appointment are to be different. The testatrix contemplated that they should take through a will coming into operation at Joseph's death.

As to authority—the power is one in the nature of a trust, and a trust is created for the objects, though the power be one of selection, and though the objects of the power were relations. On this *Birch v. Wade* (1) is a direct authority, and the decision of Sir William Grant is adopted as law in Lord St. Leonards on Powers, 8th ed., pp. 659 and 662. He says, p. 662:—“Again, in *Birch v. Wade* (1) the gift by will was to trustees for the wife for life, and after her death in thirds to his brother and two sisters for their lives. After the death of his brother and one of his sisters he gave the third of each to their children; and as to the other third of the principal it was to be left to the disposal of his wife among such of her relations as she might think proper, after the death of his sisters. It was held, as we have seen, that this was a power in the nature of a trust, and her relations living at her death were decreed to be entitled, though there was no selection made by her.”

There the objects were relations, as here, and the cases are quite undistinguishable.

But it was said that the decisions of Lord Hatherley in *White's Trusts* (2) and of Lord Romilly in *Phene's Trusts* (3) lay down rules of construction applicable to the present case, and govern it in favour of the appellant's contention. It is only necessary to

(1) *Ves. & R.* 198.(2) *Johns.* 656.(3) *L. R.* 5 Eq. p. 348.

refer to the language of the will in each of them to see how widely different these cases are. In *White's Trusts* (1) the gift was to two named trustees upon trust for testator's son, R. H. White, for life, and to divide the capital among his children. And the will then proceeded—"But should my said son die childless, I confide in the said trustees for applying the said last-mentioned sum of £2500 capital stock to the benefit of such other of my children, or their issue, as they may think fit for the interest and good of my family." It was held on the language of the will that the words pointed to a personal enjoyment by the objects of the power at the death of the tenant-for-life, and that none of those who predeceased the tenant-for-life could share in the benefit of an appointment under the power.

*Appeal.*  
1911.

REID  
v.  
SWAN.

The Lord  
Chancellor.

*Phene's Trusts* (2) stands on the same principle, for the executors were to divide the fund amongst persons in existence.

Lord Justice Chitty in *Wilson v. Duguid* (3) says that those two cases are plainly distinguishable from the line of cases of which *Brown v. Higgs* (4) and the long line of cases which follow are examples; and he states the principle on which those two cases rest, and which I have already mentioned.

Mr. Ronan contended that the words "are to be paid and transferred to such relatives" show that personal enjoyment was contemplated, and that they must be alive to accept transfers or receive payment. I think those words are no more than a form of gift. Further, if an appointee of Joseph who survived, and thus took a vested interest in his share, died during the currency of the life estates, would that interest be divested because he was not alive to receive the transfer?

Upon the whole, I am of opinion that the order of Mr. Justice Barton is perfectly right, and that the appeal must be dismissed with costs.

HOLMES, L.J. :—

The Court is asked to construe a bequest in the will of Mrs. Thomasine Eleanor Swan, and to declare who, in the events that

(1) Johns. 656.

(2) L. R. 5 Eq. 346.

(3) 24 Ch. D. 251.

(4) 8 Ves. 561.

*Appeal.* have happened, is now entitled to the subject-matter of such bequest.  
1911. The testatrix, who was a widow when she executed her will in  
REID January, 1879, bequeathed certain dividends and securities upon  
v. trust for her son, Joseph Swan, for his life, and after his decease  
SWAN. on trust for such of his children or remoter issue, and in such shares  
Holmes, L.J. as he should by deed or will appoint, and in default of appointment  
and so far as same should not extend upon trust for his child or  
children, or remoter issue, who should survive him, in equal shares,  
the child or children of a deceased child to take his or their parent's  
share. As Joseph died without issue, this bequest upon his death  
did not become operative, but I have quoted it for the purpose of  
pointing out that it indicates with great clearness the death of  
Joseph as being the period at which the persons taking in default  
of appointment were to be ascertained.

The bequest with which we are concerned is that which follows what I have read, and which was to take effect in the event that happened—the death of Joseph without any issue him surviving. Unfortunately, the testatrix here departs from the careful and detailed completeness which is shown in the gift to Joseph and his issue. It is admitted that in this bequest something is implied beyond what is expressed, and I propose to read it, introducing into it the words which counsel on both sides agree are required by judicial decision. The gift will then run thus—"In case of no such issue of the said Joseph Swan him surviving, the dividends, interest, and proceeds of the said principal moneys and securities are for their natural lives to be paid in such shares to my daughters, Mrs. Mack and Mrs. Browne, and to my grandson, William Swan, as said Joseph Swan shall appoint, and on their respective deaths such principal moneys and securities are to be paid and transferred to such relatives of his late father as my said son, Joseph Swan, may by his will direct and appoint," and in default of such appointment, and so far as the same shall not extend, the said principal moneys and securities are to be paid and transferred to the statutory next-of-kin of the said William Swan in equal shares.

Joseph Swan died on the 16th December, 1902, without having exercised the power of appointment by will thus given him in favour of the relatives of his late father; and the three tenants for

life are now dead, William Swan, the grandson of the testatrix, the last survivor, having died on the 7th May, 1910. The only question argued in this Court is at what date the members of the class of statutory next-of-kin of William Swan, the husband of the testatrix, are, in the events that have happened, to be ascertained. I gather from the judgment of Barton, J., that two other questions were discussed in his Court, but the appellant is not interested in one of them, and would only be interested in the other if we reversed the declaration as to the date of ascertaining the class contained in the order appealed from. That declaration is that the class of relatives of William Swan who became entitled to the property bequeathed in default of any appointment by Joseph Swan consists of the statutory next-of-kin of William Swan living at the date of the death of Joseph. Now, if I were asked to construe the will introducing into it what it is admitted must be implied from its language, it would not occur to me, in the absence of authority, that any other meaning could be given to it than what has been thus declared. Joseph Swan by his will could have appointed to persons who, if they were relatives of his father, might have included appointees who were not his father's next-of-kin, or excluded persons who were; but on the death of Joseph any appointee under his will who survived him would take a vested interest in the appointed share, subject to the life estates. As he made no appointment, the property was to go to another class, and why should that class not take vested interests at the time when appointees, if there had been any, would have taken such interests? To postpone the ascertainment of the class to the expiration of the life estates would, in my opinion, be contrary, not only to the general policy of the law, which favours the vesting of legacies at the earliest date consistent with the other provisions of the will, but also to the intention of the testatrix as shown by the language used. But, although this seems to me to be the true construction, I should gladly follow any judicial decision which in a case like the present has laid down a different principle. I can, however, find none. The appellant's counsel rely on *White's Trusts* (1) and *Phene's Trusts* (2), and the respondents

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(1) Johns. 656.

(2) L. R. 5 Eq. 346.



*Appeal.* on *Wilson v. Duguid* (1), but these cases can be distinguished  
 1911. from the present. I agree with Barton, J., that *Birch v. Wade* (2)  
 REID is the most like it, and although it is not very fully reported, I  
 v. gather that Sir W. Grant would have construed Mrs. Swan's will  
 SWAN. as I have done.  
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I ought to refer to Mr. Ronan's ingenious argument founded on the words, "such principal moneys and securities *are to be paid and transferred* to such relatives," showing, as he contends, that the persons whom the testatrix intended to take upon the deaths of the tenants for life were persons then living and capable of accepting payment and transfers. But if I am right in saying that an appointee by will who survived Joseph would take a vested interest in his share, could it be contended that such interest would be divested if he died during the currency of the life estates? Yet if it would not, there would be the same impossibility of making a personal payment or transfer as there would be in the case of one of the next-of-kin of the husband of the testatrix surviving Joseph, but dying in the life-time of the tenants for life.

I am of opinion that the argument based on the words I have mentioned is a subtle fallacy.

The appeal must be disallowed.

CHERRY, L.J. :—

I concur, though, I must admit, with considerable hesitation. The difficulty in this, and indeed in most of the cases on the construction of wills, is that the Court is dealing with a state of facts which the testator did not contemplate at all. We are supposed to be ascertaining the testator's intention, but what we are really doing is rather speculating as to what his intention *would have been* if he had known beforehand what has actually occurred.

In this case the testatrix conferred upon Joseph Swan a testamentary power of appointment, and a testamentary power only. If that power had been exercised, the date for ascertaining

the class from which the appointee or appointees should have been selected would, undoubtedly, have been the date of the death of the donee of the power. Why, then, it is said, should a different date be selected for ascertaining the class of persons who are to take in default of appointment? The answer given by Mr. Ronan and Mr. Samuels is that, in the words of Chitty, J., in *Wilson v. Duguid* (1), "the cases on 'relations' are very peculiar," and in such cases, the class to take in default of appointment is different from that from amongst whom an appointment may lawfully be made;—the former being a more restricted class than the latter. If the class is different, it is urged, there is no reason why it should be ascertained at the same moment of time; and *Re White's Trusts* (2) and *In re Phene's Trusts* (3) are relied upon as authorities for postponing the date of ascertaining the class to take in default of appointment until the death of the last tenant for life. It is said that these cases are distinguishable upon the ground that they were not cases of a testamentary power of appointment, but, as a matter of fact, they have since their decision, as Mr. Harrison very candidly admitted, been interpreted by all text-writers of authority as applying to cases where a testamentary power of appointment was conferred. I cannot myself see why they should not so apply in a case where, as in the present case, the class to take in default of appointment is different from that from among whom the donee of the power might have appointed.

On the other hand, as Barton, J., has said, the case of *Birch v. Wade* (4) is the case most like the present one, and it is a direct authority the other way. Mr. Ronan was unable to distinguish it, and merely urged that the date of the ascertainment of the class may not have been of consequence in the special circumstances of that case. But we cannot assume this to have been so; and as the other members of the Court, as well as Barton, J., have come to the conclusion that the declaration made in that case by Sir William Grant (though the point is not referred to in his judgment) correctly interprets the law, I accept it as

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(1) 24 Ch. D., at p. 251.

(2) Johns. 656.

(3) L. R. 5 Eq. 346.

(4) 3 V. & B. 198.

*Appeal.* doing so, and agree that the order of Barton, J., should be  
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r.  
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Cherry, L.J.

Solicitors for the plaintiffs: *H. B. Burton & Son.*

Solicitors for the personal representatives of J. H. Mack  
*Stanuell & Son.*

Solicitors for the personal representative of William Swan  
(the last surviving tenant for life): *H. and W. Stanley.*

Solicitor for Joseph Percival Swan: *Norris Goddard.*

Solicitors for Emily B. Swan: *Montgomery and Chaytor.*

W. G.

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June 2, 17,  
19.

## WINDER, TENANT; VERSCHOYLE, LANDLORD.

*Land Law (Ir.) Acts—Fair rent application—Incorporation of land held under lease with demesne by the common owner of the leasehold interest and demesne—Subsequent severance of title—Land Law (Ir.) Act, 1896, sect. 5, sub-sect. (1)<sup>b</sup> (ii) and (iii).*

1. When the owner of a demesne who held adjoining lands under a lease incorporated the leaseholds with the demesne, and afterwards conveyed the demesne to one purchaser and assigned the leaseholds to another: *Held*, that the leaseholds were undemesned by the severance of the unity of possession of the demesne and the leaseholds.

2. Section 5, sub-section (1) *b* (ii), of the Land Law (Ireland) Act, 1896, excluding from the operation of the Land Law Acts any tenancy in a holding substantially consisting of "land which when first demised was demesne, and which the provisions of the contract of tenancy or the circumstances of the case show was intended to be preserved as demesne or resumed as demesne by the landlord," applies to the case of a landlord who has parted with portion of his demesne by a demise with the intention of preserving or resuming it as demesne, and not to the case of an owner of a demesne who has added thereto adjoining land of which he was tenant, which latter case comes within the provisions of sub-clause (iii) of sect. 5 (1) *b*.

THIS was an appeal by the landlord and cross-appeal by the tenant, from an order of Fitz Gerald, J., dated 21st March, 1911, fixing a fair rent on the lands of Kilberry, in the county Kildare, containing 64 acres, which immediately adjoins the demesne of Bert, formerly the seat of the Burgh family. By a lease dated

the 30th December, 1770, Francis Brown demised to William Burgh of Bert part of the lands of Kilberry, containing 101A. 3R. 20P. at the yearly rent of £91 10s., with a covenant for renewal; but it did not appear whether or not this lease was ever renewed. By a lease dated the 20th February, 1809, Richard Verschoyle demised to Thomas Burgh part of the lands of Kilberry, being the holding now before the Court, for the term of twenty-one years, at the yearly rent of £23 7s. 4d. By a lease dated the 3rd April, 1825, Robert Verschoyle demised the holding to Sir Ulysses Burgh of Bert for a further term of twenty-one years, at the rent of £23 7s. 4d., and by a further lease dated the 3rd January, 1846, Robert Verschoyle demised the holding to the said Ulysses Burgh, then Lord Downes, for a term of three lives, or thirty-one years, at the rent of £53 9s. 10d., under which lease the lands were held at the date of the originating application. Prior to this lease the holding of Kilberry, at least one-fourth of which was planted with ornamental timber, had been incorporated with the demesne of Bert, and so continued until the sale of the latter in 1909, hereinafter mentioned. Lord Downes died in 1863, and was succeeded in his estates in the county Kildare, including the mansion-house and demesne of Bert, and the adjoining holding of Kilberry, by Lord Seaton, who died in 1888, and was succeeded in the said estates by his son, the present Lord Seaton. Prior to the year 1909 the latter sold all his estates in Kildare to the occupying tenants under the Land Purchase Acts, save the mansion-house and demesne of Bert, which were held in fee-simple, and had been for a number of years let to a Mrs. Geoghegan, and the said holding of Kilberry, which had also for a number of years been sublet under an agistment contract at a lesser rent than that reserved by the lease of 1846. Lord Seaton, wishing to dispose of all his land in Ireland, sold the mansion-house and demesne of Bert to Mrs. Geoghegan, the conveyance to her being executed on the 11th November, 1909; but Mrs. Geoghegan refused to become assignee of the holding of Kilberry, although Lord Seaton offered it to her without additional payment. Lord Seaton thereupon instructed his solicitor, Mr. Figgis, to sell the holding of Kilberry, if possible, or to find someone to take it off his hands, and finally an assignee

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*Appeal.* was found by Mr. Figgis, in Henry Winder, to whom the hold-  
*1911.* ing of Kilberry was assigned, on the 4th February, 1910, for a  
*WINDER,* nominal consideration, Winder covenanting to keep Lord Seaton  
*Tenant;* indemnified against the rent and covenants in the lease of 1846.  
*VERSCHOYLE,* On the 22nd February, 1910, Winder served the originating notice  
*Landlord.* in the present case, and, on the County Court Judge dismissing  
the application, appealed to Fitz Gerald, J., who fixed a fair rent  
on Kilberry, the portion thereof which had been planted with  
ornamental timber being valued as agricultural land. Hence this  
appeal, and a cross-appeal by the tenant.

*S. L. Brown, K.C., and Meredith, K.C., for the landlord:—*

[They contended that the assignment to Winder was a colour-  
able transaction to enable a fair rent to be fixed, that Winder was  
not in *bona fide* occupation of the holding, and that the holding was  
not agricultural or pastoral in its character.] We rely on the pro-  
visions of section 5 (1) and (2) of the Act of 1896, as excluding  
this holding from the Land Acts. It is clear that the holding  
was “first demised” by the lease of 1846: *Simpson v. Farley* (1),  
and that at the date of that demise the holding was demesne,  
having been incorporated with the demesne of Bert. Both the  
circumstances of the case and the provisions of the lease of 1846,  
which contains a covenant not to be found in the former leases,  
viz., to preserve the trees, and under which the rent was greatly  
increased, show clearly that this holding was intended to be  
preserved as demesne. Sub-clause 2 applies to lands which by  
the action of either the landlord or tenant had become demesne  
when “first demised”; sub-clause 3 applying to lands not  
demesne when first demised, but incorporated in a demesne by  
the tenant. If this holding comes under sub-clause 2, no  
severance of Bert from Kilberry by Lord Seaton can enable  
a fair rent to be fixed.

*James O'Connor, K.C., and T. H. Maxwell, for the tenant:—*

The second sub-clause of section 5 (1) *b* has no application.  
There cannot be a demesne at large; it must be either landlord's

demesne or tenant's demesne; and sub-clause 2 shows clearly by its wording that it relates solely to landlord's demesne. No doubt the holding of Kilberry was incorporated with Bert demesne, but on the conveyance of Bert to Mrs. Geoghegan the unity of possession became severed, and Kilberry was no longer demesne: *Watson v. Grubb* (1). Lord Seaton himself could have had a fair rent fixed in the interval of time between the conveyance of Bert to Mrs. Geoghegan and the assignment of Kilberry to Winder, as once the severance of Bert and Kilberry had taken place the latter would not have formed part of a demesne at the time of the application to fix a fair rent within sub-clause 3.

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[Reference was made to *Pratt v. Gormanston* (2), *Gethins v. Riversdale* (3), and *Magner v. Hawkes* (4).]

HOLMES, L.J.:—

June 19.

This is an appeal from an order of Mr. Commissioner FitzGerald fixing a fair rent on the lands of Kilberry, containing about 65 statute acres, and held under a lease dated the 3rd January, 1846, for the term of three lives, of which at least one is still living, and for the term of thirty-one years from the 29th September, 1845.

There have been discussed in the arguments in this Court two questions of law and one of fact, the nature of which will be understood by a statement of some matters which, if not admitted, are, in my opinion, as well as in that of the Judicial Commissioner, clearly established by the evidence.

Before the end of the eighteenth century a gentleman named Burgh was the owner of a mansion called Bert House, and a demesne attached thereto. In 1809 Richard Verschoyle demised the lands of Kilberry, the subject of this appeal, to Thomas Burgh, the then owner of Bert House and demesne, for a term of twenty-one years; and in 1825 Robert Verschoyle demised the same lands to Sir Ulysses Burgh, who had succeeded Thomas Burgh in his Bert property, for the further term of twenty-one years. This was followed by the existing lease of 1846, already

(1) 39 I. L. T. R. 177.

(3) [1899] 2 I. R. 81.

(2) [1894] 2 I. R. 557.

(4) 28 L. R. Ir. 365.

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*WINDER,*  
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mentioned, the lessor in which was Robert Verschoyle, and the lessee Ulysses Burgh, who had then become Lord Downes. The demised premises adjoined the Bert demesne; and I have no doubt that before the lease of 1846, and during one of the previous terms, they had been incorporated with it. The Judicial Commissioner has enumerated five circumstances that satisfied him of this incorporation; and I should be only repeating his words if I were to state my grounds for agreeing with him. We thus have a demesne comprised in part of the original demesne on which the mansion-house stood, and in part of the lands of Kilberry demised by the lease of 1846. This continued to be the state of things when Lord Downes died in 1863, and when his property in County Kildare passed to his nephew, Lord Seaton, upon whose death in 1888 the present Lord Seaton became the owner. He has not lived much in Ireland. Mrs. Geoghegan became tenant of the mansion-house nine or ten years ago, and she let a great part of the demesne, including the Kilberry portion, on agistment contracts. In the course of the year 1909 Lord Seaton had sold under the Land Purchase Acts all his lands in County Kildare except Bert House and demesne, for which also he was anxious to find a purchaser. Mrs. Geoghegan was willing to buy, at a price agreed on, the mansion and the original demesne which Lord Seaton held in fee-simple, and this transfer was carried out by deed of the 11th November, 1909. She could not, however, be induced to take an assignment of the lease of Kilberry, although it was offered to her without any additional payment. Lord Seaton then asked Mr. Figgis, his solicitor, to get someone to take it off his hands, and that gentleman found an assignee in Henry Winder, son of an old client, to whom the demised premises were conveyed by a deed of the 4th February, 1910, the consideration being nominal, but Mr. Winder covenanting to keep Lord Seaton indemnified against the rent and covenants in the lease. I have no doubt that Winder was told by Figgis that counsel had advised that he would be entitled to have a fair rent fixed, and that he would be at no loss in taking the assignment.

Accordingly, he applied to have a fair rent fixed by the County Court Judge, who dismissed the application; but, on a re-hearing before the Judicial Commissioner, the order appealed from was

made. The question of fact which I have said has been discussed in this appeal, Judge Barry found against the applicant by deciding that he is not in *bona fide* occupation of the holding, and for a time I was induced to agree with this finding; but further consideration of the evidence—especially of the correspondence—has convinced me that it cannot be supported. It depends upon whether the assignment to Winder of the leasehold premises was a real transaction and not a mere device to enable the application to have a fair rent fixed to be made in his name without giving him any interest in the demised premises. If the assignment was what it purports to be, and had the effect of transferring the holding to Winder, I think that it follows that he has been in occupation of Kilberry since its execution. Up to that time Lord Seaton was the occupier, although the lands were used by others under agistment contracts; but after the assignment, if made in good faith, the occupation passed to Winder. The letters between Lord Seaton and Mr. Figgis show clearly that the anxiety of the former was to free himself from a rent which exceeded the profits that could be derived from the lands, and from his liability under stringent covenants. The latter knew that this could only be done by an indemnity from a solvent assignee, and being solicitor to Mr. Winder's mother, he must have been aware that, subject to her life estate, that gentleman was entitled to what seems to be a valuable property in County Kildare. Believing that the assignee would succeed in having a fair rent fixed, he thought that it would benefit one client and the son of another if the former were to assign to the latter. It is suggested that there was some secret arrangement or understanding with Mrs. Geoghegan that she was to be given some interest in Kilberry, but there was no evidence of this. On the contrary, there is convincing proof that she was determined to have no connexion with a holding of which Mr. Verschoyle was the landlord; and the fact that she has been allowed by Winder to use an avenue which passes over a portion of Kilberry is of no importance. I agree with the Judicial Commissioner that Winder took over the leasehold premises as a speculation, in the belief that he could much increase their value by having a fair rent fixed thereon. This may have been a rash act, but was, in my opinion,

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*Appeal.* an honest and straightforward speculation, and if this be  
1911. so, he has been in legal occupation since the assignment.

*WINDER,*  
*Tenant;*  
*VERSCHOYLE,* There can be, in fact, no other occupier, as he has taken the  
*Landlord.* position which Lord Seaton held before the transfer.

Holmes, L.J.

I come now to the two questions of law, the first of which, and the one chiefly relied on by counsel for the appellant, turns upon the construction of the Land Law (Ireland) Act, 1896, section 5 (1). The previous Land Law Acts did not apply to any tenancies in demesne land; and there were many cases in which the question discussed and decided was, whether the holding was demesne land or not. Of these cases there were two well-known classes—one being where there had been at one time an undoubted demesne attached to a mansion-house, but where the owner, previous to the Act of 1881, had let a portion thereof for a term of years, or from year to year, to a tenant who used it for agricultural or pastoral purposes. In cases of this kind the tenant often applied to have a fair rent fixed, on the ground that his landlord, by the letting, had deprived the land let of the character of a demesne. The other class of cases was where the owner of an undoubted demesne had become tenant of adjoining land, and applied to have a fair rent fixed therefor. Here the question raised was, whether the tenant had not added the holding to or incorporated it with the original demesne. In this state of things there was passed the Act of 1896, whose section 5 (1), clause (b), enacts that the Land Law Acts shall not apply to a tenancy in any holding which substantially consists (ii) of land which when first demised was demesne, and which the provisions of the contract or the circumstances of the case show was intended to be preserved as demesne or resumed as demesne by the landlord; or (iii) land incorporated in a demesne by the tenant, and forming part of a demesne at the time the application to fix a fair rent is made. It has been argued by Mr. Brown for the appellant that the present case comes under sub-clause (ii), inasmuch as the holding was “first demised” by the lease of 1846, that at that date it was demesne, having during the currency of the previous lease been incorporated by the tenant in the old Bert demesne, and that it was intended to be preserved as demesne. If this sub-clause applies at all to the present case, I would hold, following decisions of this

Court, that the premises were first demised by the lease of 1846, and that the lessee intended to preserve it as demesne. But I am of opinion that this sub-clause relates exclusively to the first class of cases I have mentioned--cases where the owner of demesne let part of it to a tenant. I have frequently heard the 5th section of the Act of 1896 quoted and discussed in appeals to this Court during the last fourteen years, and it never occurred to me, nor, I think, to any other Judge, that it could be applied where the owner of a demesne added thereto adjoining land of which he was tenant. I believe that this has never been actually decided, but this is because it has never been raised. It is enough to read the provision to see its meaning. Take, for example, its final words--"was intended to be resumed as demesne by the landlord." How could a lessor who had no demesne, and therefore never held the demised premises as demesne, resume them as demesne? A case like the present is dealt with in the sub-clause that follows. The first enactment relates to a landlord who has parted with part of his demesne by a demise; the second to a lessee who has added to his demesne adjoining land held by him as tenant.

Now, the words of the second provision show that after the tenant has incorporated the demised lands in his demesne, he may undo the incorporation and convert them into what they were before it took place, because they must continue to form part of the demesne at the time the application to fix a fair rent is made. The remaining legal question is, whether this has been the result of what has happened in this case. It has been argued that it is not, because there has been no change in the physical condition of the premises, and that, as far as appearance goes, they are as much part of the Bert demesne as they have been for years. I admit that their character of demesne could have been put an end to by physically separating them from the old demesne, and converting them into a separate and distinct parcel of land; but there are other ways in which the same result can be brought about, and I know of no better method than by a severance of title. Bert House and the original demesne have been conveyed to Mrs. Geoghegan. The demised lands have been assigned to Winder--of what demesne do they

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now form a part? Not of Lord Seaton's, for he has parted with every acre of his Irish demesne. Not of Mrs. Geoghegan's, for although she is now owner of Bert House and its old demesne, she is not entitled to place a foot on the demised premises. Not of Verschoyle's or Winder's, for neither of them has ever had a residence or demesne within miles of this place. For these reasons I hold that at the time the application to fix the fair rent was made the leased land had ceased to be part of a demesne, and, being an agricultural or pastoral holding, the tenant was entitled to have a fair rent fixed. This disposes of the landlord's appeal; but the tenant has also obtained leave to serve, and has served, notice of appeal from so much of the order of the Judicial Commissioner as declares that the Court in determining the fair rent was at liberty to value the portion of the holding, containing about 17 acres, under plantation, as if it had not been so planted.

They were planted by a predecessor in title of Lord Seaton to make the land more attractive in its character of demesne; but this plantation reduced its value for agricultural or pastoral purposes. Lord Seaton, however, has by assigning to Winder entitled him to have a fair rent fixed on a holding within the Land Acts; and I am of opinion that the lessor is entitled to claim that in fixing the fair rent such rent should be ascertained as if the land was in its original condition before its value was reduced by the action of the lessee, for which the lessor was not responsible.

The result is that both appeals are disallowed, and that the order appealed from is affirmed. Each party must bear his costs of this appeal.

CHERRY, L.J:—

The application to fix a fair rent in this case is opposed by the landlord on four distinct grounds: (1) that the tenant is not in *bona fide* occupation of the holding; (2) that the holding is not agricultural or pastoral in character; (3) that it consists of "land which when first demised was demesne, and which the provision of the contract of tenancy or the circumstances of the case show was intended to be preserved as demesne or

resumed as demesne by the landlord" (Land Act, 1896, s. 5 (1) (b) (ii)); and (4) that it consists of "land incorporated in a demesne by the tenant and forming part of a demesne at the time the application to fix a fair rent is made" (Land Act, 1896, s. 5 (1) (b) (iii)).

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Upon the first of these grounds, when the appeal was opened, I formed a very strong opinion that the contention of the landlord was correct. I thought that the assignment to Mr. Winder of the Kilberry lands was, in the words of the County Court Judge, "a merely colourable performance for the purpose of prejudicing Mr. Verschoyle," and that the real occupier now as formerly was Lord Seaton. A careful perusal of the correspondence has, however, convinced me that this imputation upon both Mr. Winder and Lord Seaton is not justified by the facts, and that the assignment of February 4th, 1910, was a perfectly *bona fide* transaction, and intended by both parties to have its full effect, without any secret trust or concealed arrangement of any kind; Mr. Winder treats this assignment to him as a speculation, the success of which depends upon whether or not he succeeds in getting a fair rent fixed. But it is, in my opinion, an honest speculation, and there is nothing illegal or morally wrong in his entering into it. I therefore agree with the view of Fitz Gerald, J., that he must be treated as *bona fide* in occupation of the holding, and that the landlord fails in his first ground of objection to the fixing of a fair rent.

The second ground of objection, namely, that the holding is not agricultural or pastoral in character, is easily disposed of. Indeed it was not seriously pressed before us. It would be absurd to say that a holding of 65 acres upon which there is apparently no building of any kind (except a small lodge), held under an ordinary agricultural lease, at an acreable rent, was not agricultural in character, merely because 17 of the 65 acres had been planted with trees by the tenant, either before or after the granting of the lease. This contention of the landlord, therefore, in my opinion fails equally with that based upon the alleged non-occupation by the tenant.

I come now to the more serious contentions, based upon the alleged demesne character of the lands, which were pressed with



*Appeal.* so much ability and so much ingenuity by the landlord's counsel.  
 1911. They argue that the present case comes within both sub-clause  
 WINDER, (ii) and sub-clause (iii) of sub-sect. (1) (b) of the 5th section of  
 Tenant; the Act of 1896. It is generally considered that these two  
 VERSCHOYLE, clauses are mutually exclusive of each other—the one dealing  
 Landlord. with land which originally formed part of the landlord's demesne,  
 Cherry, L.J. and which was let by him as demesne to the tenant; the other  
 dealing with land which never was demesne in the hands of the  
 landlord, but which has been converted into demesne by the tenant.  
 The contention here is that sub-clause (ii) may apply to tenant's  
 demesne as well as to landlord's demesne where the land was con-  
 verted into demesne by the tenant before it was "first demised"  
 to him. This appears to me to be almost a contradiction in  
 terms, but I do not think it necessary to decide the point in the  
 present case; for in my opinion, even admitting that tenant's  
 demesne may come within sub-clause (ii), there is nothing  
 whatever in the lease of 1846, or in any of the earlier leases,  
 or in the evidence, to show that the lands were intended to be  
 preserved as demesne, or resumed as demesne, by the landlord.  
 The lease of 1846, from beginning to end, does not contain the  
 word "demesne." There is no reference whatsoever to any  
 demesne being in existence, whether of landlord or tenant;  
 and the one and only provision in it which the landlord's  
 counsel can point to in support of their contention is the  
 ordinary covenant to "preserve, uphold, maintain, repair, and  
 keep" the demised premises in good condition. This covenant,  
 which is in the ordinary form of all agricultural leases, mentions  
 among a number of general words "trees" and "plantations";  
 but such a covenant cannot, *per se*, in any way prove an intention  
 to preserve lands as demesne. It is, as I have said, a most usual  
 provision in leases of ordinary farms, which there is not the  
 smallest ground for alleging to be demesnes of any kind.

On the second branch of this argument as to demesne, the  
 landlord's counsel have a stronger case; for the circumstances  
 prove, I think, as found by both the County Court Judge and  
 FitzGerald, J., that these lands of Kilberry were incorporated  
 at some time or other with the demesne of Bert by the tenant.  
 But the sub-clause requires something more than this. The lands

must form part of a demesne at the time the application to fix a fair rent is made. Do these lands of Kilberry now form part of the demesne of Bert, or not? That is the question for our determination. Is the mere severance of title in law, which has been effected by the conveyance of the demesne of Bert to Mrs. Geoghegan without the lands of Kilberry (which she refused to take over) sufficient to deprive the latter lands of their character of demesne? or must the words "forming part of a demesne" be construed as referring to their physical condition, in which admittedly there has been no change, and must they still be considered as forming part of the demesne for the purposes of the Land Acts, though in different ownership?

Now, there have been many decisions in this Court that where portion of a demesne has been merely let upon a long lease apart from the mansion-house it was thereby undemesned, and this without apparently any physical alteration in the lands so let. In *Cheevers v. Fallon* (1), where portion of a demesne was let, apart from the rest of the demesne, by a lease for lives renewable for ever, it was held by this Court that it was thereby undemesned, even though the lands were described in the lease which was held to undemesne them, as "part of the demesne," and they actually afterwards came back by a sub-letting into the hands of the owner of the demesne, who was held to be entitled to have a fair rent fixed. Similarly, in *Watson v. Grubb* (2), a very recent case, cited by Mr. Maxwell at the close of the arguments, it was held that where the owner of a demesne made a lease of 18 acres of it to a tenant, and afterwards demised the mansion-house and the rest of the demesne for lives renewable for ever, it was held that this parting with a perpetual interest in the demesne had the effect of undemesning the lands previously let. "This act of the owner," says Holmes, L.J. (3), "whereby he parted for ever with the possession and control of the mansion-house, and all the demesne, save 18 acres, had the effect of depriving those 18 acres of the character of demesne as fully and effectually as if he had made an absolute sale of the lands." If the severance of title has thus the effect of undemesning lands which were previously demesne in the hands of the landlord, *a fortiori* it appears to me

*Appeal.*  
1911.

WINDER,  
Tenant;  
VERSCHOYLE,  
Landlord.

Cherry, L.J.

(1) [1895] 2 I. R. 407.

(3) 39 I. L. T. R., at p. 180.

(2) 39 I. L. T. R. 177.

*Appeal.*  
1911.

WINDER,  
Tenant;

VERSCHOYLE,  
Landlord.

Cherry, L.J.

that a similar severance will have that effect where the lands only became demesne by being united by the tenant to the demesne from which they are now separated, provided, of course, that this separation is genuine and *bona fide*. I, therefore, agree with Fitz Gerald, J., that in the present case once the unity of possession was destroyed between Bert demesne and Kilberry by the conveyance of Bert to Mrs. Geoghegan it is impossible to say that Kilberry continued to form part of the Bert demesne. It follows that either in the hands of Lord Seaton, or his assignee, Mr. Winder, the tenant of Kilberry became entitled to have a fair rent fixed. As it was the conveyance of Bert to Mrs. Geoghegan, and not that of Kilberry to Mr. Winder, that effected this separation of title, it is immaterial, upon this point of the case, to consider whether the conveyance to Mr. Winder was or was not a *bona fide* transaction. No one suggests that there was anything collusive or unreal in the conveyance of Bert to Mrs. Geoghegan. The landlord's objections to the fixing of the fair rent, therefore, all fail, and the order of Fitz Gerald, J., must be affirmed.

Upon the question as to the amount of the judicial rent raised by the tenant's appeal, I have great doubts whether we have any jurisdiction to interfere at all, for no appeal lies to this Court "in respect of any decision as to the amount of fair rent" (Land Act, 1881, sect. 48 (2)). But, in any event, I think that the decision of Fitz Gerald, J., was right on this question also. The tenant cannot, to use a vulgar expression, "have it both ways." If he applies to have a fair rent fixed on the ground that the holding consists of agricultural land, he must be content to have a rent fixed upon it as such, and he cannot claim any exemption from rent by reason of the fact that his predecessor in title, for his own convenience, planted a substantial portion of the holding with trees, even though he is bound by the covenant in his lease not to cut down those trees.

Both appeals, therefore, in my opinion, should be dismissed (1).

Solicitors for the landlord: *Brown & McCann*.

Solicitors for the tenant: *Kennedy & Figgis*.

R. ST. J. C.

(1) Sir S. Walker, C., was present during the argument, but did not deliver judgment.

IN THE MATTER OF THE ESTATE OF EDWARD K. B.  
TIGHE.

Ross, J.

1911.

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June 28.

*Land Purchase Acts—Superior interest—Reversion of the Crown—Redemption price of—By whom payable.*

Lands were granted by Letters Patent to the ancestor of the Marquis of Ormonde, leaving a reversion in the Crown. By certain private Acts of Parliament the successors in title of the patentees were empowered to make leases for lives renewable for ever, and fee-farm grants subject to reversion to the Crown. Portion of the lands was subsequently conveyed by fee-farm grant made pursuant to the provisions of the Renewable Leasehold Conversion Act. On a sale by the fee-farm grantee to the tenants under the Land Act, 1903 :—

*Held*, that the redemption price of the Crown reversion should be paid by the vendor, the fee-farm grantee, out of the purchase-money of the estate, and not by the fee-farm grantor.

## FINAL SCHEDULE OF INCUMBRANCES.

The lands for sale in the matter were, with other lands, held by Lord Ormonde under Letters Patent of 29th Henry 8, whereby the King granted to Peter Butler, Earl of Ossory and Ormonde, and James, Lord Butler, his eldest son, certain lands, situate in the county of Kilkenny and other counties, to be held to the said Peter and James for the term of their lives and the life of the survivor of them, and to the heirs male of the body of the said Peter lawfully begotten for ever. By certain private Acts passed in the reign of Anne, the Marquis of Ormonde was empowered to make fee-farm grants, reserving a reversion to the Crown on failure of heirs male of the body of Peter Butler, the original patentee.

By deed of fee-farm grant, dated the 13th January, 1852, made pursuant to the provisions of the Renewable Leasehold Conversion Act, between the Earl of Milltown and Barbara, Countess of Milltown, in whom the estate of the Marquis of Ormonde was then vested, of the one part, and William Frederick



*Ross, J.*  
1911.

*In re*  
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ESTATE.

Fownes Tighe of the other part, the lands of Bramblestown and other lands, situate in the barony of Gowran and county of Kilkenny, part of the lands comprised in the said Letters Patent, were granted to William Frederick Fownes Tighe, his heirs and assigns for ever, subject to the yearly rent of £203 10s. 9d., said yearly rent to be paid clear over and above all quit and Crown rents, taxes, subsidies, cesses, duties, and all other public charges and payments whatsoever, with a covenant by the grantee to pay the yearly rent, and a covenant by the grantors for quiet enjoyment. The redemption price of the said rent of £203 10s. 9d. had been fixed by the Court at the sum of £5,597 5s. 7d., which sum was payable to Sir Eyre Coote and others, trustees, successors in title of the grantors in the said fee-farm grant. The value of the Crown's reversion on the failure of heirs male in the Butler family had been fixed at the sum of £159 9s., and the question now came before the Court for determination as to whether this sum of £159 9s. should be paid by the said Sir Eyre Coote and others, successors in title of the grantors, or by the vendor, out of the purchase-money of the estate.

*Darley*, for the vendor:—

The vendor holds under a fee-farm grant, which purports to be a grant of the whole fee-simple in the lands, subject only to the fee-farm rent. The Crown reversion is a superior interest affecting Sir Eyre Coote's interest, and should be redeemed by him. Previous to the passing of the Land Act, 1903, Crown reversions were not superior interests, but section 98 (2) of that Act provides that the expression "superior interest" in the Land Purchase Acts shall include any reversion or estate expectant on the determination of an estate tail or a base fee, whether such reversion or estate is or is not vested in the Crown. *Re Costello* (1) only decided that the Crown reversion was still subsisting.

*Norwood*, for Sir Eyre Coote:—

There are no express or implied covenants for title in the fee-farm grant. The only covenant is one for quiet enjoyment. This

Crown interest is really a remainder, and not a reversion to which rent is incident. *Murphy's Estate* (1) decided that the fee-farm grantor could not be compelled to redeem the Crown reversion. In *Fischer's Estate* (2) it was held that the Crown reversion was a reversion in the lands, and not in the fee-farm rent. The only effect of section 98 of the Land Act, 1903, is to enable Crown reversions to be compulsorily redeemed; but otherwise their incidence is not affected or altered.

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*In re*  
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ESTATE.

*Darley*, in reply :—

The cases cited were prior to the Land Act, 1903, and only decided that the Crown reversion was not a superior interest, and, therefore, was not compulsorily redeemable. As regards *Murphy's Estate* (1), had there been power to compel the grantor to redeem the Crown reversion, the Court would have compelled him to do so.

Ross, J. :—

In my opinion the Act of 1903 does not alter the character of this Crown reversion. In both the cases cited and relied upon by Mr. Norwood the question was, who, as between the fee-farm grantor and the fee-farm grantee, was to redeem. In both these cases it was decided that the grantor was not liable to redeem, and I find by reference to the schedule in *Murphy's Estate* (1) that, in obedience to the decision of the Court of Appeal, the redemption price of the crown reversion was paid by the vendor, the fee-farm grantee. This appears also to have been done in *Fischer's Estate* (2), where Meredith, J., held that the Crown reversion was a reversion in the land, and not in the rent. I am unable to distinguish the present case in principle from the cases cited. I therefore declare that the Crown reversion must be redeemed by the vendor out of the purchase-money of the estate.

Solicitors for the vendor : *T. T. Mccredy & Son*.

Solicitor for Sir Eyre Coote : *R. A. Howe*.

D. M. S.

(1) 34 Ir. L. T. R. 42.

(2) [1901] 1 I. R. 377.

*M. R.* IN THE MATTER OF THE 11 & 12 VICT. C. 68, AND IN THE  
 1911. MATTER OF THE SHARE OF WILLIAM GEORGE  
 June 12, 20. SITWELL, AN INFANT, IN THE ASSETS OF THE HON. JOHN  
 PRENDERGAST VEREKER, DECEASED, INTESTATE.

*Practice—Payment out of Court—Trustee Relief Act—Fund exceeding £500  
 —Title depending only on proof of identity and age of applicant—R. S. C.  
 (Ir.), 1905, Ord. LV, Rule 3 (1), (2).*

An application for payment out of a fund exceeding £500 lodged in Court under the Trustee Relief Act should be made on motion, although the title of the applicant depends only on proof of identity and age.

*In re Campbell's Trusts*, 31 L. R. (Ir.), 434, not followed.

THIS was an application on summons on the part of the above-named William George Sitwell for transfer to him of the sum of £8725 2s. 6d. consols, and payment of dividends accrued thereon since February 16th, 1909. This sum represented with accumulations the share of the applicant of the assets of his grandfather, the Honourable John Prendergast Vereker, as one of his next-of-kin. The fund had been lodged in Court under the Trustee Relief Act in January, 1893, by Hannah Louisa Vereker, widow and administratrix of the deceased, who died intestate. William George Sitwell attained age on April 10th, 1911.

*W. M. Crozier*, in support of the application.

The application is rightly made on summons under Order LV, Rule 3 (1). The title depends only on proof of the identity and age of the applicant. The limit of £500 imposed by Rule 3 (2) does not control the jurisdiction on an application under Rule 3 (1); *In re Campbell's Trusts* (1), a decision of Porter, M.R., that sub-sect. 5 of Rule 3 of Order LV of the Rules of 1891, which imposed a limit of £500 in the case of an application under the

Trustee Relief Act, did not control the jurisdiction to make an order on summons under sub-section 1 of Rule 3, with which sub-section 1 of the present Order LV, Rule 3, is identical.

*M. R.*  
1911.

*In re*  
SITWELL.

THE MASTER OF THE ROLLS said that the practice was not to make any order on summons for payment out of money lodged under the Trustee Relief Act where the amount exceeded £500, but he allowed the summons to be put into the Court list, and made an order for transfer and payment on a subsequent day.

Solicitors for the applicant: *Crozier & Son.*

W. L. (1)

## ARMSTRONG v. DICKSON.

(1909. No. 136.)

*Practice—Chancery Division—Notice parties—Action for sale by puisne mortgagee—Service of order on prior mortgagee—Application for lodgment of title-deeds—R. S. C. Ir., 1905, Order XVI, Rule 40.*

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July 3.

Order XVI, Rule 40, applies in the case of an order for sale of lands made in an action brought by a puisne mortgagee against the mortgagor for the sale of the mortgaged lands, and the Court has jurisdiction under this rule to direct the prior mortgagee to be served with notice of the order.

A prior mortgagee having been served with notice of the order for sale, the plaintiff applied for an order that the prior mortgagee should lodge the title-deeds in his possession in Court, and that they should be delivered to the plaintiff's solicitors: the prior mortgagee was willing to produce the deeds and let copies be taken pursuant to s. 16 of the Conveyancing Act, 1881. No steps had been taken under the order for sale.

The Court, having regard to the offer of the prior mortgagee, declined to make any order.

### SUMMONS.

This was an application on the part of the plaintiff for an order that William Alexander, solicitor, who claimed to be entitled as an incumbrancer upon the premises comprised in

(1) See Order LXXVII, Rule 9 (d) (Proceedings under Trustee Act, 1893), which is similar to Order LV, Rule 3 (5), of the Rules of 1891, annulled by Rules of 1894.—[REF.]



*M. R.* the order for sale, dated June 15th, 1910, in priority to the  
*1911.* plaintiff, might be served with notice of the judgment and order  
*ARMSTRONG* in this action, and that he might be ordered to bring in and lodge  
*v.* in the office of the clerk of judgments, records, and writs the  
*DICKSON.* title-deeds relating to the said lands without prejudice to his lien  
(if any), and that the same be then handed over to the plaintiff's  
solicitors, or to their properly appointed agent, or for such other  
order as to the Judge might seem meet and necessary in the  
circumstances of the case.

The plaintiff was Robert J. Armstrong; the defendants were Charlotte Dickson, Charlotte Crawford, and Alexander Crawford. The action was brought by the plaintiff to raise the amount of a judgment mortgage secured on house property in Belfast, and for a sale. On June 15th, 1910, judgment was given in the action, declaring the sum secured by the judgment mortgage well charged on the defendants' interest in the premises, and ordering an account to be taken of what was due to the plaintiff on foot of the said judgment mortgage; and that, in default of payment to the plaintiff of the sum which should be found due, with further interest and costs as therein mentioned, within one month from the date of the filing of the Chief Clerk's certificate, the premises be sold under conditions of sale to be settled by the Judge at Chambers, and that the usual account and inquiry be taken and made as to incumbrances, and the priorities of such, and declaring the plaintiff entitled to his costs in the same priority with his demand. The chief clerk, by his certificate filed November 21st, 1910, certified that £143 4s. 11*d.* was due to the plaintiff on foot of his judgment up to November 19th, 1910, the date of the certificate.

William Alexander was the first incumbrancer on the lands ordered to be sold, and there was due to him for principal the sum of £704 18s. 2*d.*, with interest upon £504 18s. 2*d.* thereof at the rate of 5 per cent. per annum from November 1st, 1909, and upon £200 thereof from March 3rd, 1908, at the same rate. There was also due to him the costs of the mortgages and miscellaneous costs incurred in relation to his security.

Advertisements for incumbrances were directed by the chief clerk, but no claim was lodged by William Alexander. The plaintiff requested him to concur in a sale for £950 for which a private offer had been made, but he declined.

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The plaintiff alleged that, in order to enable his solicitors to prepare an abstract of title and conditions of sale and to submit the same to the conveyancing counsel of the Court, and to enable the plaintiff to adduce title to a purchaser, it was necessary that the title-deeds and documents relating to the premises in the possession of William Alexander should be brought in by him and lodged in Court (subject to his lien), and handed over to the plaintiff's solicitors. This application was accordingly instituted on February 6th, 1911. William Alexander was solicitor on record for the defendants; but they withdrew their retainer, and in consequence he did not instruct counsel to appear for them at the trial.

*Tobias*, in support of the summons :—

Order XVI, rule 40, applies in the present case, as it is an action "for the sale of hereditaments." This rule is substituted for rule 9 of section 66 of the Chancery (Ireland) Act, 1867. Under the old practice, apart from statute, a prior mortgagee was a necessary party to a suit by a puisne mortgagee, but rule 7 of section 66 provided that any mortgagee might have a decree for sale without serving any other mortgagee, unless such mortgagee was in actual possession or receipt of the rents and profits of the mortgaged lands; and rule 9 provided that in such a case the persons who, according to the practice of the Court previous to the passing of the Chancery Regulation Act, 1850, would have been necessary parties to the suit, should be served with notice of the decree. The old practice is stated by the Vice-Chancellor in *Loughran v. Loughran* (1), and in *Burroughs and Gresson's Equity Pleader*, pp. 31, 32, there referred to; see also *Richey and Bewley's Chancery Act, 1867*, p. 34 (s.) If Mr. Alexander is served with notice of the decree, he becomes a party, and can be ordered to lodge the deeds in his possession.

(1) 15 L. R. Ir. 75.

*M. R.* The Court should make an order on him to lodge the deeds, if he  
 1911. does not come in within a month to move to discharge the order  
 ARMSTRONG for sale. If the sale had been directed to take place in the Land  
 v. Judge's Court, an order could be made there for lodgment of the  
 DICKSON. deeds: Rules of 1859, rule 20, Madden's Land Judges' Practice,  
 pp. 129, 130, and *In re Girdwood* (1), there referred to. [He also  
 referred as to lodgment of documents subject to lien to *Little v.*  
*Little* (2), *Gerty v. Mann* (3).]

*Charles Murphy*, for Mr. Alexander:—

The words of rule 40 are “for the partition or sale,” which should be read together, and suggest a proceeding for partition in which a sale is directed. But, assuming that rule 40 applies here, the only effect of making an order for service of the decree on Mr. Alexander is to make him a party and bind his interest. There is no power to order him to deliver up the title-deeds: *Re Parkes* (4). There is no question of solicitor's lien here.

#### THE MASTER OF THE ROLLS:—

No time has been wasted by the arguments in this case. It seems to me essential that the practice in these mortgagee suits should be clearly settled. I am not sure that we are wise in retaining in the Court of Chancery as many sales as we do retain, but the parties in these mortgagee suits so frequently implore the Court to retain the sale here that the Court has acceded to their applications with a view to expedition and saving of expense, just as has been done in administration suits when there are tenancies from year to year to be sold. The fact is, that these mortgagee suits have become a common feature of Chancery proceedings, and sales directed in them come before my chief clerk and myself every week. The question is, how are parties who have priority as mortgagees over a plaintiff mortgagee to be bound at some period of the proceedings before the actual sale directed by the Court. It frequently happens that when conditions of sale are sent to the Court counsel, he says that no sale can take place

(1) 5 L. R. 1r. 45.

(2) 2 Jones, 270.

(3) 29 L. R. 1r. 7.

(4) 66 L. T. (N. S.) 151.

unless a prior mortgagee consents to a sale and disposition of the property, or is made a party to the proceedings. Little difficulty is experienced as a rule, because the prior incumbrancer is satisfied that the Court will not sell unless a fair price is got. Banks in Ireland who are mortgagees have given all possible facilities to the Court by lodging deeds and consenting to sales without friction, or attempting to convey on unreasonable terms. But here is a mortgagee, Mr. Alexander, who is a first mortgagee. It is plain on the figures that he is the real owner of the property, because though the plaintiff has a claim under his mortgage, yet, if the costs and other incidental expenses have been first discharged, it would appear that Mr. Alexander will carry off all the purchase-money. Still Mr. Tobias says that he is entitled under the rules of Court to an order permitting him to serve notice of the order for sale upon Mr. Alexander, who, if he thinks fit, can come in within a month, and move the Court to discharge or vary the order for sale. I may say at once that I can easily imagine a case in which it would be the imperative duty of the first mortgagee to come in and lay before the Court facts which would not only justify but compel the Court to vary the order obtained, otherwise a person who had no interest in the property could come in and get an order for sale, knowing that he could not be reached, which would be intolerable; but I keep my mind open on that point. The question is, is Mr. Tobias entitled to this order? At first I was entirely against Mr. Tobias, but I am convinced that he law, is right. He has gone back to the beginning and traced the step by step. He has shown me that Order XVI, Rule 40, does apply to a suit of this description, and was meant and intended to apply. The rule is not very happily framed, but when examined in the light of previous Acts it is sufficiently clear that the framers of that rule intended that service of a notice of a judgment for sale in a mortgage suit should be as effective as service of notice of a judgment in an administration suit. Section 66 of the Irish Chancery Act of 1867 has been referred to during the argument. Rule 7 of section 66 of that Act commences with the words, "Any mortgagee or other incumbrancer on land may have a decree for a foreclosure and sale, or a sale of the mortgaged lands, without serving any other

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mortgagee or incumbrancer, or a trustee for such mortgagee or incumbrancer, unless such mortgagee, incumbrancer, or trustee is in actual possession or receipt of the rents and profits of the mortgaged or incumbered lands." Rule 9 opens with the words, "In all the above cases" (*i.e.* cases mentioned in the preceding rules) "the persons who, according to the practice of the Court (previous to the passing of the Court of Chancery (Ireland) Regulation Act, 1850), would have been necessary parties to the suit shall be served with notice of the decree; and after such notice they shall, unless cause be shown to the contrary, within a time to be limited by a General Order of the Court, be bound by the proceedings in the same manner as if they had been originally made parties to the suit, and they may, by an order of course, have liberty to attend the proceedings under the decree; and any party so served may, within such time as shall in that behalf be prescribed by the General Order of the Court, apply to the Court to add to or vary the decree." Note (s) to Rule 7 in Richey and Bewley's Chancery Practice, p. 34, states, that this rule is founded on the 11th and 12th General Orders of the 31st of July, 1851, and is in accordance with the recommendation of the Commissioners appointed to inquire into the Courts of Common Law and Chancery. Note (t) states that in the absence of any order or direction to the contrary the notice of the decree must be served personally. Reference is made to the corresponding section of the English statute (15 & 16 Vict. c. 86, s. 42), and it is stated that the time within which a party served with notice of a decree may apply to add to or vary it is one calendar month from the service of the notice. It is enough to say that the object of the framers of the Act of 1867 was to remedy what had been a grievous wrong to suitors in the Court of Chancery, and therefore, instead of making every person interested a party in suits for administration or for payment of moneys secured by mortgage, there was simply service of notice of the order for sale. Has the Judicature Act altered the provisions of the Act of 1867? Order XVI, Rule 40, is, I think, unhappily worded, and anyone reading it without the assistance afforded by Mr. Tobias might easily think that it had nothing to do with a judgment recovered [in a mortgage suit. As Mr. Murphy said, the words

"partition or sale" suggest an action for partition in which a sale is decreed. But if you turn to Order XV and Order XXXIII, you will find that you can arrive at the conclusion that the words "partition or sale" may be read distributively, and that the Court may read them as embracing a judgment or order under Order XXXIII, Rule 7, directing an account of incumbrances. No injustice will be done, for Order XVI, Rule 40, gives Mr. Alexander full opportunity to come in. He is to be bound by the proceedings, whatever that means. He has a month to come in and apply to the Court to discharge, add to, or vary the judgment. The one matter which pressed on my mind was this. If Mr. Tobias was entitled as of right to have the costs put first on the allocation schedule, I would be sorry to feel myself compelled to make the order I have made. I mean if a puisne incumbrancer would by getting such an order secure to himself or his solicitor the advantage of the costs of sale whether his claim was reached or not, that would seem to me to be an injustice which the Court would strive to prevent. But the officer tells me that the practice of this Court is, that if the mortgage is not reached, the mortgagee is not placed on the allocation schedule for his costs without special direction of the Court. I entirely approve of that practice, and I shall follow it in this and every other case, so that an incumbrancer coming into this Court to realize the amount of his incumbrance will not be entitled to his costs unless I find by results that he was justified in coming in. That takes away my last objection to Mr. Tobias's construction of the rule. I can discuss the other matters at the proper time. I mean the application as to lodgment of the deeds, as to which I make no order now.

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Mr. Alexander was duly served with a copy of the order of February 20th, 1911, and on June 17th, 1911, a summons was taken out by the plaintiff for an order on Mr. Alexander to lodge the deeds and documents in his possession relating to the premises, without prejudice to his lien (if any), and that the same be then handed over to the plaintiff's solicitors. Mr. Alexander made an affidavit stating that he did not object to a sale which would realize sufficient to discharge his claim for principal, interest, and

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costs, and submitted that he was entitled to retain possession of the title-deeds, till a sale had been had, and the plaintiff was in a position to pay him off. He also stated that the plaintiff had had an inspection of the deeds, and that he could obtain inspection and take copies under the provisions of section 16 of the Conveyancing Act of 1881, but that he would lodge the deeds forthwith if the Court was of opinion that he was bound to do so.

The summons came on for hearing on July 3rd.

*Tobias*, for the plaintiff:—

Mr. Alexander has taken no steps to discharge the order, and is bound by it, just as if he was a party to the action. He should facilitate the sale and hand over the deeds to enable the plaintiff's solicitors to carry out the sale. [He referred to *Livesey v. Harding* (1), *Knott v. Cottee* (No. 4) (2) 21, Daniell's Ch. Pr., 7th ed., pp. 872, 873, 896.]

*Charles Murphy*, for Mr. Alexander.

Service of notice of the decree makes the person served a party only in respect of the interest taken by him, and not in respect of any liability to account: *Walker v. Seligmann* (3), followed in *Re Parkes* (4), in which case the Court refused to make an order on a submortgagee to deliver up title-deeds, as the application was premature. Mr. Alexander is willing to produce the deeds and let the plaintiff take copies, if he likes to avail himself of section 16 of the Conveyancing Act, 1881, and save the expense of paying for copies. In *Livesey v. Harding* (1) the matter was ripe for completion, and the purchase-money in Court, and the mortgagee had consented to the sale. Here the application is premature. It is not the practice of the Court of Chancery to sell without the consent of the first mortgagee, or at least without a reserve price so as to safeguard him. Under section 37 of the Landed Estates Court Act the Land Judge has all the powers of a Court of Equity, and yet a special rule was required to enable the Land Judge to direct a mortgagee to lodge deeds in Court.

(1) 1 Beav. 343.

(2) 27 Beav. 33.

(3) 12 Eq. 152.

(4) 66 L. T. (N. S.) 151.

## THE MASTER OF THE ROLLS:—

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1911.ARMSTRONG  
*v.*  
DICKSON.

The question involved is one of considerable importance. Second mortgagees in this country apparently think that they have greater rights than in England. In this case Mr. Tobias's client has got an exaggerated notion of his own importance. If Mr. Alexander, as first mortgagee, or as mortgagee in priority to Mr. Tobias's client, has legal control of the title-deeds of the property, the Court ought not to take these deeds away from him, unless a stage has been reached at which the deeds should be handed over to the Court to give to a purchaser, or to enable the sale to be carried through. I agree with Mr. Tobias that the effect of Order XVI, Rule 40, is to make Mr. Alexander as liable to an order to deliver possession of the title-deeds when required as if he had been named a defendant in the beginning; but having regard to the fact that the plaintiff is only a second mortgagee, and from what appears from the affidavit, I would not be disposed to make an order against him, even if he had been a party to the action from the start. I cannot allow any mortgagee to defeat a sale which has been ordered by the Court, and I reserve liberty to make an order against Mr. Alexander, when it becomes necessary, but I will not make any order against him now. He is a solicitor of the Court, and has pledged his oath that he is willing to facilitate the sale, and to produce the deeds, and allow the plaintiff to take copies of them under the provisions of section 16 of the Conveyancing Act, 1881. The plaintiff, however, wants to have the deeds lodged in Court and given out to him, so that everything may be made easy for him, instead of proceeding under the Conveyancing Act to take copies. There is a good deal of common sense in what Mr. Murphy says as to the Landed Estates Court. There is a special Rule (Rules of 1859, Rule 20) as to lodgment of deeds. Banks who are mortgagees generally consent to a sale and are willing to lodge deeds; and deeds lodged are frequently handed out to the solicitor having carriage, for the purpose of proceedings in the Court, on his undertaking to return them within a specified time. There is a possibility of loss, if such a thing is done. I do not see that the position of a mortgagee



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DICKSON. should be prejudiced, who says that he is willing to allow the original deeds to be seen and copies to be taken. As there does not appear to be an express decision on the point, I shall not make an order for costs against the plaintiff; but I shall make no order on the application against Mr. Alexander, having regard to the undertaking in his affidavit, and he will have the costs of this motion as part of his costs.

The plaintiff must proceed with the sale, and prepare his abstract of title and conditions of sale.

Solicitors for the plaintiff: *Wheeler and M'Cutcheon.*

Solicitor for Mr. Alexander: *Mr. Alexander, in person.*

W. L.

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# IN RE LYONS'S ESTATE.

May 16. *Land Law (Ireland) Acts—51 & 52 Vict. c. 49, s. 2; 59 & 60 Vict. c. 47.*  
Appeal. s. 30 (1)—*Limit on advances—Purchase in trust—Husband and wife*  
June 12, 15. *purchasers—Subsequent purchase by husband alone—Purchases on different estates—Declaration of trust—To whom and at what time to be made.*

A purchaser in trust for another is not entitled to the benefit of section 30 of the Land Law (Ireland) Act, 1896, unless he declares the trust to the Land Commission before the advance to him as trustee is made.

Where a husband and wife obtained an advance for the purchase of a holding, and the husband alone afterwards applied for an advance for the purchase of a holding on another estate:

*Held*, that, in computing the amount which might be advanced on the husband's application, the prior advance to him and his wife could not be excluded.

(1) 51 & 52 Vict. c. 49 (Purchase of Land (Ireland) Amendment Act, 1888), section 2:—"No advance shall be sanctioned by the Land Commission to any one purchaser of land under the Purchase of Land (Ireland) Act, 1885, or the Acts amending the same, exceeding the sum of £3000, unless in the opinion of the Land Commission the advance of such larger amount (not exceeding £5000) is expedient for carrying out sales on the estate of the same landlord."

59 & 60 Vict. c. 47 (Land Law (Ireland) Act, 1896), section 30:—"In computing the amount advanced to any one purchaser under the

GEORGE HARTIGAN, a tenant of the estate, agreed to purchase his holding in the townland of Ballinascaule for £6134, and applied to the Land Commission for its advance. On the 20th October, 1904, the tenant and his wife obtained an advance of £2231 for the purchase of a holding on the estate of John O'Donnell and Susan O'Donnell under an agreement of the 20th April, 1904. It was stated by the tenant that the latter advance was made to his wife and himself as trustees for James M. Clery. The agreement in *O'Donnell's Estate* did not contain any statement to that effect. Prior to 1895, James M. Clery was entitled to the holding and in possession of it. In that year the landlords recovered judgment against him for rent. A *fi. fa.* was issued against him under which the sheriff put up the holding for sale by auction, and George Hartigan and Mary J. Hartigan purchased it for £50. Clery was the brother of Mrs. Hartigan, and it was stated in affidavit made by George Hartigan, that the purchase of Clery's holding from the sheriff and the subsequent purchase of it from the landlord in *O'Donnell's Estate* were made by Hartigan and his wife as trustees for Clery, and that he remained in possession throughout. On the 15th February, 1909, Hartigan and wife conveyed the holding to Clery. It appeared that at the time of the sheriff's sales George and Mary Hartigan informed the sheriff that they were purchasing in trust for Clery, and that George Hartigan gave the same information to the landlord's agent, but at what time did not appear. No notice of the trust was given to the Land Commission until the application was made for the advance for the purchase of the holding at Ballinascaule.

At the request of the vendor, the Estates Commissioners referred to the Judicial Commissioner the question whether in ruling on the application for advance they could disregard the advance of £2231 made to the Hartigans in *In re O'Donnell's Estate*.

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provisions of section 2 of the Purchase of Land (Ireland) Amendment Act, 1888, an advance made to such purchaser as a trustee for another, or as personal representative of a deceased person, shall not, if (as regards advances made after the passing of this Act) he declares at the time that he was so acting, be included, and for the purposes of the said section the advance in such cases shall be deemed to have been made to the person beneficially interested in such advance."

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The Judicial Commissioner referred the matter back to the Estates Commissioners, to ascertain, *inter alia*, as matters of fact—

(1) Whether the Hartigans, after the sheriff's assignment, and at the time of the purchase under the Land Purchase Acts, were trustees for James M. Clery?

(2) Whether they declared to the Land Commission at or before the time of making the advance, that they were such trustees?

In answer to the first question, the Estates Commissioners found that the Hartigans were trustees, but that it did not appear that they were trustees for Clery.

They answered the second question in the negative.

*The Solicitor-General (C. A. O'Connor, K.C.) and J. Linehan, for the Treasury.*

*Serjeant O'Brien, K.C., for Hartigan.*

*Jellett, K.C., for the vendor.*

WYLIE, J. :—

The whole question turns on the construction of section 30 of the Land Law (Ireland) Act of 1896. The section is not clearly drawn. It is in these words:—"In computing the amount advanced to any one purchaser under the provisions of section 2 of the Purchase of Land (Ireland) Amendment Act, 1888, an advance made to such purchaser as a trustee for another, or as personal representative of a deceased person, shall not, if (as regards advances made after the passing of this Act) he declares at the time that he was so acting, be included, and for the purposes of the said section the advance in such cases shall be deemed to have been made to the persons beneficially interested in such advance." I take it that, in the present case, there is a finding by the Land Commission that, with reference to the first advance to the tenant, he did purchase as a trustee. The question then arises, whether he declared that he was so acting, within the meaning of the section? The section does not say to whom the declaration must be made, in what manner, or at what time. Mr. Linehan, on behalf of the Treasury, contends that the only time it should be made

would be the time of the advance. But the tenant-purchaser is not in a position to know the time when the advance is made. It is not, as a rule, made for some years after the agreement is lodged. The transaction is carried through by the solicitor for the vendor. In my opinion, the sole object of requiring the declaration is to prevent fraud. If the tenant has made the necessary declaration prior to or during the negotiations for the first advance, that he was acting as a trustee, the intention, I think, of the section is satisfied. It would be open to an applicant for a further advance who had already obtained an advance in his personal capacity to allege that he purchased as a trustee on the first occasion—hence the necessity for a prior declaration. I, therefore, think that the section applies to the present case. I answer the first question “Yes.” The first advance comes within the section, and is not to be taken into account.

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J. E. W.

The Treasury appealed (1).

*Appeal.*

*The Solicitor-General* and *J. Linehan*, for the appellants:—

June 12.

The questions for the Court are—In the case of a person purchasing in trust for another, at what time and to whom is the declaration of the trusteeship to be made in order to bring the trustee purchaser within the provisions of the 30th section of the Land Act of 1896, and to enable him when afterwards purchasing on his own account to obtain, if necessary, advances up to the maximum amount which may be advanced to a single purchaser by the Land Commission? As to time, we submit that the declaration must be made before the advance to him as trustee. That is the time when the statement can be tested and the facts investigated. If it were open to the purchaser to defer making the declaration till he subsequently applied for an advance to himself personally, there would be a direct temptation to represent a previous advance as having been made to the purchaser as trustee, whether this was true or not, in cases where it would be

(1) In the Court of Appeal before THE LORD CHANCELLOR, and LORDS JUSTICES HOLMES and CHERRY.



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necessary in order to obtain the full amount applied for. The object of the statute in requiring a declaration was to prevent fraud.

That the persons to whom the declaration is to be made are the Land Commission is self-evident. They are the only persons interested in the information. The notice to the sheriff and the landlord's agent was not a compliance with the statute. The purchaser might as well contend that notice to any member of the public would be sufficient.

*Serjeant O'Brien, K.C.*, for Hartigan, and *Jellett, K.C.*, for the landlord :—

Assuming that the notice to the sheriff and the landlord was an insufficient declaration of the trust within the meaning of the section, the Land Commission had notice when the present application was made that the purchase of the holding in *O'Donnell's Estate* was in trust for another person. It is sufficient if the declaration is made to the Land Commission at any time before the second advance is made. That is the time when the trusteeship is of importance, and when the computation referred to in the section is to be made. The section seems to contemplate that the declaration and computation may be made simultaneously. There is no time actually fixed by the section for making the declaration. "At the time" is just as applicable to the present advance as to the advance to the party as trustee. The advance to the trustee may be made before he has any intention of purchasing on his own account.

Neither does the section state, either expressly or by necessary intendment, whom the declaration is to be made to. All that is required is that something must have taken place which fixes the party with trusteeship, and is binding as between him and the *cestui que trust*. In that view the declaration made at the auction was sufficient to guard against the fraud to which Mr. Justice Wylie refers, namely, alleging trusteeship as an afterthought for the purpose of obtaining a subsequent advance of larger amounts than the applicant could otherwise obtain.

Further, the parties applying for the advances in this case were not the same. The first advance was to two persons jointly,

Hartigan and his wife ; the second is applied for by one of them alone, Hartigan himself. Under these circumstances the limit in the Act of 1888 does not apply in the present case, and independently of the 30th section of the Act of 1896 Hartigan is entitled to the advance for which he asks.

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THE LORD CHANCELLOR :—

June 15.

I agree with Mr. Justice Wylie that the case turns on the construction of the 30th section of the Land Act, 1896. First, to whom is the declaration of trust to be made ? Surely, to the Land Commission by whom the advance is being made, and at or before the time when the advance is made. The first advance was made to Hartigan and his wife in *O'Donnell's Estate*. The Estates Commissioners when the case was sent back to them do not find that it was made in trust for Clery. The finding is merely that they purchased as trustees on that occasion. It is argued on behalf of Hartigan, the present applicant, first, that there is a plain legal inference of fact that he and his wife purchased the holding in *O'Donnell's Estate* as trustees for Clery ; secondly, that, because a statement to that effect was made to the sub-sheriff at the sale in 1895, the 30th section was complied with. It is absurd to treat this as a declaration under the section. It is only necessary to read the section to see this, and to see how easy it would be to evade the statutory limit on advances if we held such a notice to be sufficient, or that it would be enough to give the notice to the Land Commission just before the second advance was made. We hold that the declaration under the section must be made to the Land Commission, and must be made before the advance to the trustee purchaser.

HOLMES, L.J. :—

The question of law submitted to the Judicial Commissioner arose out of an application made by George Hartigan to the Estates Commissioners for an advance of £6134 to enable him to purchase his holding from Mr. Lyons. Hartigan and his wife had already obtained an advance of £2231 for the purchase of a holding on the estate of William H. O'Donnell and another. As the power of the Estates Commissioners to advance purchase-

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money to any one purchaser of land under the Land Purchase Acts is confined to the sum of £7000, they decided that they could not advance to Hartigan more than £4769 for the purchase of his holding on the Lyons estate; whereupon it was contended on behalf of Hartigan that the previous purchase was made by him and his wife as trustees for James Clery, a former tenant of the holding, and reliance was placed on the Land Law (Ireland) Act, 1896, section 30, which enacts that in computing the amount advanced to any one purchaser, an advance made to such purchaser as a trustee for another shall not, if he declares at the time that he was so acting, be included, and the advance in such case shall be deemed to have been made to the person beneficially interested in such advance. In these circumstances, the Estates Commissioners submitted to Wylie, J., as a question of law—"Can the Estates Commissioners, when ruling on Hartigan's application, disregard the previous advance of £2231 made to him and his wife in *O'Donnell's Estate*?"

When this matter first came before the Judicial Commissioner, he referred it back to the Estates Commissioners to ascertain three matters of fact—(1) whether Hartigan and his wife, at the time of the purchase of the holding on *O'Donnell's Estate* were trustees of the lands for James M. Clery; (2) whether they declared to the Land Commission, at or before the time of making the advance, that they were such trustees; and (3) whether at any other time, and to whom did they make such declaration. The reply of the Estates Commissioners to the first of these queries is ambiguous, but I am prepared to treat it, as Mr. Justice Wylie seems to have done, as an answer in the affirmative. The second query was answered in the negative, and in reply to the third it was found that George and Mary Hartigan, who had purchased the holding at a sheriff's sale, had informed the under-sheriff that they were purchasing the lands in trust for Clery for family reasons, and that they also informed the landlord's agent of this at a time which cannot be fixed. Wylie, J., thereupon decided the question of law originally submitted to him in the affirmative.

I am not quite clear as to the ground of his decision; but I think it must have been that the information given to the under-sheriff and to the agent was a declaration within section 30 of the

Act of 1896. If this was the view of the learned Judge, I cannot accept it, nor have counsel for the respondent referred to it in the argument in this Court. It is quite clear that the declaration must be made to the Land Commission. We are asked, however, to hold that the time for making the declaration is not necessarily before or at the time when the first advance was made, but that it would be sufficient if made before the second advance. I am of opinion that the purchaser must declare the trusteeship at some date before the first advance was actually made. I hold this to be the only possible meaning of the language used. I agree with Mr. Justice Wylie that the object of requiring the declaration is to prevent fraud. But unless it is made when the fact can be investigated before the advance is completed, it would be useless for this purpose. The declaration not only relieves the purchaser from having the advance computed, against him when another advance is afterwards applied for, but the advance is to be treated as an advance to the beneficial owner, and would be regarded as an advance made to him, if he were afterwards to apply for money to purchase another holding. The object of the declaration is to let the Estates Commissioners know who is the real purchaser before the money is paid; and this object would be defeated, and an unreasonable construction given to the words of the section, if a declaration made years afterwards would be sufficient.

Another argument on behalf of the respondent is that the proposed purchasers of the two holdings are not the same, for that, in the case of the first, Hartigan's wife was joined with him in the application for the purchase-money, and that in the second he applies alone. I am of opinion that the limitation of the amount to be advanced to one purchaser cannot be got rid of by joining the applicant's wife in the application.

CHEERY, L.J.:—

I agree. I have no doubt whatever as to the construction of the 30th section of the Land Act, 1896. The object of that section was to relieve a purchasing tenant from the hardship of being refused an advance under the Land Purchase Acts, either wholly or in part, by reason of the fact that he had already had advanced to him the maximum amount which any one person

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is allowed to receive, in a case in which the previous advance was made to him in a fiduciary capacity. In order to prevent fraud, or an evasion of the provisions of the sections limiting the amount of the advance to any one tenant, the relief is given only if (in case of advances made to him as trustee after the passing of the Act) "he declares at the time that he was so acting." The words "at the time" must refer to the time of the advance to him as trustee. That is the plain grammatical meaning of the section; and that it can bear no other meaning is clearly shown by the restriction of the requirement of the declaration to advances made after the passing of the Act. If the words "at the time" refer, as the respondents here contend that they do, to the subsequent advance to him in his personal capacity, that restriction would be meaningless, for of course all such advances as to which the section is to have effect must be made after the passing of the Act.

I am quite clear also that the declaration must, to have any validity, be communicated in some way to the Land Commission. On the construction placed upon the section by Serjeant O'Brien and Mr. Jellett, an oral declaration of trust by the purchasing tenant to his wife in his bedchamber would be a sufficient compliance with the requirements of the section; and the whole thing would be turned into a farce.

In the present case, although the purchasing tenant undoubtedly purchased the holding on O'Donnell's estate in 1904 as a trustee, he did not "at the time," in any way, communicate that fact to the Land Commission; and he is, therefore, unfortunately, deprived of the benefit of the section.

I am equally clear that the restrictions upon the amount of the advance to any one tenant-purchaser imposed by the 2nd section of the Land Purchase Act, 1888, and the 53rd section of the Act of 1903, and the 15th section of the Act of 1909, apply whether the holdings purchased are on different estates or on the same estate, and whether the tenant purchases alone or jointly with some other person or persons.

Solicitor for the Treasury: *W. G. Towers.*

Solicitor for the tenant, Hartigan: *Roger Fox.*

Solicitors for the vendor: *William Roche & Son.*

IN THE MATTER OF THE ESTATE OF WILLIAM A.  
BATTERSBY.

Wylie, J.  
1911.

June 12, 13.  
July 18, 28.

*Settlement created by deed—Equitable interests in estate pur autre vie—  
Implication of cross-remainders—Intention—Statute of Limitations—  
Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 8—Joint  
owners of equitable charge in receipt of rents of lands subject to charge—  
Constructive payment of interest on charge.*

Where by a settlement created by deed, even where the trusts are executed, equitable interests in a term *pur autre vie* are limited to several persons as tenants in common in *quasi* tail, cross-remainders in *quasi* tail will be implied among them, if an intention to limit such interests sufficiently appears on the face of the instrument.

Where the owners of an equitable charge on land had, under an assumption of title to the land as tenants in tail, entered into receipt of the rents and profits, constructive payment of interest on the charge will be presumed, so as to prevent it being barred, it being for their benefit to pay such interest until they had acquired by statute a title to the lands.

OBJECTION to the final schedule of incumbrances.

The objectors were William Murray, Eohlin Francis Murray, Charles Murray, Leslie Patten Murray, Leslie Patten Murray, junior, and Alexander Evans Murray, claiming under a settlement created by the will of Henry Murray, who died on the 10th of July, 1880, and who was eldest son and heir-at-law of Alexander Murray.

The facts appearing from the objection, as stated in the judgment of Wylie, J., were as follows:—Alexander Murray by a settlement, dated the 10th August, 1810, and executed on the occasion of his second marriage with Catherine Sweny, granted the lands sold in this matter, then held by him under a lease for lives renewable for ever, to trustees, their heirs, and assigns, in trust, after said intended marriage, for said Alexander Murray for

*Wylie, J.* 1911. *In re* BATTERSBY'S ESTATE. life, and after his death for his intended wife, Catherine Sweny, for life, and, after the death of the survivor, in trust for the child or children of the said Alexander Murray on the body of the said Catherine Sweny to be begotten, in such shares as the said Alexander Murray should by deed or will appoint, and in default of appointment, in trust for such children (if more than one) share and share alike as tenants in common, and not as joint tenants, and the respective heirs of their bodies; and if only one such child, in trust for such only child and the heirs of his or her body; and upon this further trust that, in case the said Catherine should die without leaving any issue male or female of said marriage, then the said trustees should reconvey the said premises and all interest therein unto the said Alexander Murray, his heirs, and assigns for ever. Then, as a further provision for his said wife, and as a provision for the issue of the said marriage, the said Alexander Murray covenanted to pay to the trustees the sum of £100 in every year during his life, and in case the full sum of £2,000 should not have accumulated prior to his death, and in case his said wife should survive him, or should die leaving issue of said marriage, the deficiency in said sum was to be paid by his executors within six months after his death, which said sum as to the income thereof together with the said settled lands were to be as security for the payment to said Catherine Sweny of a jointure of £200 in case she survived her husband, and said sum of £2,000 was to be and enure to the issue of the said intended marriage subject to said jointure; and for payment of said jointure and of said sum of £2,000 the said Alexander Murray did thereby charge all his real and personal estate that he should die seised and possessed of.

The said Alexander Murray died in 1838, leaving the said Henry Murray, his eldest son by his first marriage, his heir-at-law, and also leaving his said wife Catherine Sweny and six children—one son and five daughters. Catherine Sweny died in 1865 leaving her said six children all surviving. Of the said six children, Harriette Murray died on the 13th March, 1870, Elizabeth Murray on the 28th December, 1880, Charlotte Murray, on the 14th January, 1881, Catherine Murray on the 26th June 1887, Charles Murray on the 17th May, 1894, and Augusta

Murray on the 29th November, 1896, and all of them died without having had any issue. None of them executed any deed or document that would have disentailed their shares under said settlement except Augusta Murray, the last survivor, who executed a disentailing deed.

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On the death of their mother, Catherine Sweny, the six children entered into possession and receipt of the rents and profits of their respective shares as tenants in common in *quasi* tail, and upon the death of each of the children without issue, the remaining children went into possession of their share, until, on the death of the fifth child, Charles Murray, the surviving child Augusta Murray, on the 17th May, 1894, got possession of the entire six shares, and she, assuming that she was tenant in *quasi* tail of the entire lands, barred the entail. The vendor, who was devisee under the will of Augusta Murray, had sold the said lands under the Land Purchase Acts.

With reference to the sum of £2,000 charged by Alexander Murray, under the settlement of the 10th August, 1810, on all his real estate for the children of the marriage, in default of it being paid to the trustees by annual sums of £100, which he thereby covenanted to pay during his life, it further appeared that when fourteen annual payments had become due, the trustees brought an action against Alexander Murray, and obtained judgment for £1,400. But from the evidence it appeared that no part of this, or of the £2,000, or any interest thereon, were ever paid in fact, and that no acknowledgment of liability was ever given.

By their objection the objectors claimed that the net proceeds of sale in this matter belonged to the estate of Henry Murray, except so much thereof as represented the shares of Augusta Murray and Harriette Murray, and were subject to the subsisting uses of the settlement created by his will, and should be dealt with accordingly, and also claimed four sixth parts of the bonus.

*Garrett W. Walker, K.C.*, in support of the objection :—

We are not in a position to make any claim in respect of the shares of Harriette, who died before the date of the settlement



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created by the will of Henry Murray, or of Augusta, who barred the entail, but we claim the shares of the other four children. Section 2 of the Act of 1874 applies expressly to the facts of the case. On the death of each child, the share of the child so dying reverted to Henry Murray, the heir-at-law of Alexander Murray. The statute could not run in favour of those who went wrongfully into possession of the shares which fell into possession after the date of the settlement created by the will of Henry Murray, under which we claim. If the limitations in settlement of the 10th August, 1810, were contained in a will, no doubt cross-remainders would be implied; but in no case can cross-remainders be implied in a deed, unless the trusts are executory: *Doe d. Clift v. Birkhead* (1). Here the trusts are clearly executed.

With regard to the £2000 charge, the Court is not justified in assuming that it was not paid or that the judgment for £1400 was not satisfied. Even if the Court does assume against us on this point, no acknowledgment was ever given, and there has been no payment of interest. No doubt the surviving joint owners of the charge, on the death of each of the children, went into possession of their respective shares in the lands; but the Court will not presume constructive payment of interest, as the surviving children who were in receipt of the rents and profits were under no duty or obligation to pay interest: see *In re Finnegan's Estate* (2). In any case mere constructive payment of interest would not keep alive the charge: *In re England* (3); *Bassett v. Allen* (4); *Topham v. Booth* (5). The principle underlying all the Statutes of Limitations is that a payment to prevent the barring by statute must be an acknowledgment by the person making the payment of his liability, and an admission of the title of the person to whom the payment is made: *Harlock v. Ashberry* (6); see also *Annaly v. Agar-Ellis* (7).

(1) 4 Exch. 110.

(2) [1906] 1 I. R. 370.

(3) [1895] 2 Ch. 100.

(4) [1898] 2 Ch. 499.

(5) 35 Ch. D. 607.

(6) 19 Ch. D. 539.

(7) [1900] 1 Ch. 774.

*D. G. Chaytor, K.C., and H. R. Poole, for the vendor :—*

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The objection cannot be sustained on several grounds.

In the first place, cross-remainders can and ought to be implied in order to carry out the manifest intention of the settlor. That he intended to create cross-remainders among the issue cannot be disputed. It is suggested that the rule as stated in Norton on Deeds (1906 ed.), p. 377, that "cross-remainders cannot be implied in a deed" is so well established that it has become almost a canon of construction. The rule, however, is much too widely stated there. You must look to its origin in order to see what was the reason for the rule. The reason was that estates of inheritance could only be created by apt words of inheritance in a deed: per Pollock, C.B., in *Doe d. Clift v. Birkhead* (1). But if the reason fails in a particular case, as where you are dealing with an estate that can pass without words of limitation, then the rule must go with it, as having nothing to operate on. In the present case the settled lands were held for an estate *pur autre vie*, and no words of limitation were necessary to pass the whole estate. The only thing necessary is that the intention should be shown on the face of the deed that the whole interest should pass: see Norton on Deeds (1906 ed.), p. 353. Similarly in the case of equitable estates: *In re Stinson's Estate* (2). Therefore, there is no reason why the Court should not imply estates, in order to carry out the manifest intention of the settlor, in deeds just as in wills: *Champ v. Champ* (3); see judgment of Holmes, L.J. (4): see also Underhill and Strahan on the Interpretation of Wills and Settlements (1906 ed.), pp. 181–185: and particularly the statement that—"it seems therefore wrong to lay it down broadly . . . that these rules as to implied cross-remainders have no application to deeds." The intention to create cross-remainders is shown here: first, in the recital that the object of the settlement was to make provision for all the children of the marriage; and, then, in the ultimate gift over, under which the property was only to go over "in bloc" and not piecemeal, upon the death of all the children. See

(1) 4 Exch., at p. 124.

(2) [1910] 1 I. R. 47.

(3) 30 L. R. Ir. 72.

(4) *Id.*, at pp. 80–81.

*Wylie, J.* also *Williams v. Pinckney* (1), *Roberts v. Akeroyd* (2), *Tringham v. Greenhill* (3). In the case of executory trusts, cross-remainders in a deed have been implied: see *West v. Errissey* (4), *Phillips v. James* (5).

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Further, the Court can, if necessary, rectify the deed in accordance with the intention of the parties: see *In re Stinson's Estate* (6), *Fitzgerald v. Fitzgerald* (7); or the Court can treat the deed as reformed: *In re Bird* (8).

Lastly, assuming that cross-remainders cannot be implied, still the objection must fail, because there is an unsatisfied judgment by the settlor, through whom the objectors claim, for £1400, which is vested in the vendor and is charged on the lands. This would more than swallow up the residue of the purchase-money. It is a well-established principle of equity that a party claiming an estate under circumstances like the present must first discharge any claim the estate may have against him: *Akerman v. Akerman* (9); in other words, he must bring in what he owes to the estate: *Davies v. Tagart* (10). The Statutes of Limitations have no application because (a) the parties entitled to the charge were in possession of the lands all the time; (b) it is none the less a debt because the remedy for it may be barred: *Akerman v. Akerman* (11); and (c) no presumption of satisfaction of a judgment arises from length of time: *Kenny v. Ruscumb* (12), where the period was sixty years. Even if there was a presumption of payment, it would be rebutted by showing that the party liable had no means to pay: *Fludong v. Winter* (13). Here the settlor died insolvent.

July 28.

WYLIE, J. :—

In this case an objection has been filed to the final schedule by a number of persons claiming under a settlement created by the will of Henry Murray, to be entitled, in the events that have

(1) 67 L. J. Ch. 34.

(2) [1893] 3 Ch. 363.

(3) [1904] 2 Ch. 487.

(4) 2 P. Wms. 349.

(5) 2 Dr. & Sm. 404.

(6) [1910] 1 I. R. 47.

(7) [1902] 1 I. R. 477.

(8) 3 Ch. D. 214.

(9) [1891] 3 Ch. 212.

(10) [1900] 2 Ch. 164.

(11) [1891] 3 Ch., at pp. 216, 221.

(12) 2 Atk. 45.

(13) 19 Ves. 195.

happened, to two-thirds of the purchase-money of the estate sold by the vendor in this matter, and to two-thirds of the bonus. [His Lordship stated the facts as already set out, and continued]—Now, if Augusta Murray was right in assuming that she was tenant in *quasi* tail of the entire lands when she barred the entail, it is admitted that the vendor would be entitled to the entire purchase-money and bonus, and that the objectors would not have any claim on either.

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The first question, therefore, I have to decide is whether, on the true construction of this marriage settlement, all the shares of the six tenants in common, in the events that happened, became finally vested in Augusta Murray, the surviving child, either by virtue of implied cross-remainders between the children or of an implied *quasi* estate tail in the mother in remainder after the several *quasi* estates tail of the children?

Now, counsel on both sides admit that, if these limitations were contained in a will instead of a deed, there could be no question that cross-remainders would be implied: see *In re Ridge's Trusts* (1). But counsel for the objectors contends that in no case can cross-remainders be implied in a deed, unless the trusts are executory, which he contends, and I think rightly, is not the case here.

The case principally relied upon in support of this contention was *Doe d. Clift v. Birkhead* (2). In that case Pollock, C.B., speaking of the rule that cross-remainders cannot be implied in a deed, says (3):—"Of the general rule there is no doubt. This rule, when correctly understood, is in truth only a branch of the general rule that no estate of inheritance can be created by deed without apt words indicating the estate to be taken, *i.e.* 'heirs' to create an estate in fee, 'heirs of the body' to create an estate tail. When lands are conveyed to the use of A and B, as tenants in common, and the heirs of their respective bodies, A and B, have estates tail, each in his own undivided moiety, but it is clear that neither of them has any estate tail whatever in the other's moiety. Let us suppose, in order to put the case as strongly as possible in favour of cross-remainders, that the deed conveying the land should contain a clause expressly stating the intent of the parties to be

(1) L. R. 6 Ch. 665.

(2) 4 Exch. 110.

(3) *Id.*, at p. 124.



Wylie, J. that, in case A or B should die without heirs of his body, his moiety should go over to the other by way of cross-remainder in tail. Then, supposing those to be the very words used there could be no doubt as to what the parties intended, but it is certain that, in the event of A or B dying without issue, the intention could not be carried into effect for want of the words 'heirs of the body' connected with the gift over by way of cross-remainder, and as this cannot be done by any words except the words 'heirs of the body,' however clearly the language may show the intention of the parties, so *a fortiori* the object cannot be effected by any inference of intention, however clearly it may arise from the context." Now, taking that as a clear statement of the settled law applicable to legal limitations in a deed of descendible freeholds, where words of inheritance are essential to create or convey by deed estates of inheritance, how far does it apply to this case?

Here we are concerned only with the limitations of equitable estates in non-descendible freeholds. That the entire legal estate is in the trustees, and that the limitations to the children are equitable, is clear from the final trust being to re-convey the premises to the settlor, his heirs and assigns.

Now, it is well settled that words of inheritance are unnecessary for the limitation of equitable interests in estates *pur autre vie*, even in executed trusts: see Norton on Deeds (1906 ed.), p. 356, and authorities there cited. It is also, I think, settled by recent authorities that I had occasion to refer to in *Rodgers v. Houston* (1) that a limitation in a deed of a trust of real estate for A, without any words of inheritance, may confer the equitable fee upon him where the intention to do so is expressed or sufficiently shown upon the face of the instrument: see also *In re Stinson's Estate* (2).

With reference to the law as to the construction of deeds and the implication of estates, Holmes, J., in *Champ v. Champ* (3), says:—"The law relating to what has been called a gift by implication has been generally discussed in reference to the construction of wills, and we have been asked by counsel for plaintiff to hold that these authorities have no application to deeds, which

(1) [1909] 1 I. R. 322.

(3) 30 L. R. Ir., at p. 81.

(2) [1910] 1 I. R. 47.

it is argued must be construed on wholly different principles. I am unable to accept this proposition. There are, no doubt, well known rules of law which make it necessary for some purposes to use in deeds technical language which would not be required in wills, and which give a different construction to certain terms of art according to the nature of the instrument in which they occur. But I have always understood that subject to these rules of law the same governing canon of construction applies equally to wills and deeds. Both ought to be construed so as to carry out the intention of the testator or parties. If technical words are not required for its creation, there is nothing in the nature of a deed, as distinguished from a will, to prevent a gift from being implied"; and then he goes on to say (1)—"If the premises put in settlement were held in fee-simple, it is possible some difficulty might arise in implying estates of inheritance without appropriate words of limitation, but no objection can be made on this ground, where a term *pur autre vie* is dealt with." In the same case Gibson, J., concurred in this, and further says (2)—"Where it must necessarily have been intended that an interest should be given, which there are no words in the instrument expressly to confer, the defective expression is supplied so as to carry into effect the intention which, on the true construction of the whole document, is sufficiently declared."

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Now, let us see how these principles apply to the present case. In the first place, as I have said, the legal estate is in the trustees, and the limitations to be construed are of equitable interests only in an estate *pur autre vie*, in which equitable estates in *quasi fee* or *quasi tail* can be conferred, even in a deed, without the use of the technical words "heirs" or "heirs of the body."

This being so, what are the limitations? They are to the settlor for life, then to his wife for life, then to the children of the marriage in such shares as the settlor shall appoint, and, in default of appointment (which happened) the property is given to the children in these terms—"In trust for such children (if more than one) share and share alike as tenants in common, and not as joint tenants, and the respective heirs of their bodies, and if only

(1) 30 L. R., at p. 83.

(2) *Id.*, at p. 84.

*Wylie, J.* one such child, in trust for such only child and the heirs of his  
 1911. or her body." If the limitations stopped there, there could be no  
*In re* difficulty, because these limitations are in technical language which  
*BATTERSBY'S* can have only one meaning whether the estates are legal or  
*ESTATE.* equitable, and under these each child became tenant in *quasi* tail  
 of his or her undivided share, and took no interest whatever in the  
 shares of the others, and, though they all had absolute dominion  
 over their respective shares by act *inter vivos*, yet, upon the death  
 of each child without issue, and without having barred the entail,  
 his or her share would have resulted to the settlor and his heirs.

But the limitations in the deed continue thus:—"And upon this further trust that, in case the said Catherine (the mother) should die without leaving any issue male or female of said marriage, then the said trustees should reconvey the said premises and all interest therein unto the said Alexander Murray, his heirs and assigns, for ever." Now, that clause plainly shows the intention of the parties that it was only in case of default of all the issue of the mother, and, therefore, in default of all the issue of all the tenants in common, that the settled premises were to revert to the settlor, and that they were to revert as one entire premises, and not piecemeal, upon the determination of the *quasi* estate tail of each of the tenants in common. The ordinary method employed by conveyancers for carrying out such an intention is to limit cross-remainders in *quasi* tail between the tenants in common.

It is admitted, as I have said already, that if this were a will, cross-remainders would be implied in order to carry out an intention so clearly indicated. Is there any reason why the same construction should not be given to the same limitations in this deed, seeing that technical words are not required, even in a deed, to carry out such an intention in express terms in dealing with estates *pur autre vie*? If this deed contained, after the limitations to the children as tenants in common in tail, the words "with cross-remainders in tail between and amongst them," can anyone doubt that the intended legal effect would be given to those words, though the limitation is not artistically expressed? In *Champ v. Champ* (1), already referred to, where by a marriage settlement an

estate *pur autre vie* was settled in trust for the husband for life, then for the wife for life, with a limitation over to the settlor, his heirs and assigns, in case there should be no issue of the marriage attaining twenty-one, but there was no express limitation in favour of the issue, the Court implied in favour of the issue who attained twenty-one an estate in *quasi fee*.

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It seems to me, therefore, both on principle and authority, that I am bound in this case, in order to carry out the clearly declared intention of the parties, to imply cross-remainders in *quasi tail* between the tenants in common.

Whether the deed can be so construed as to confer on Catherine Sweny an estate in *quasi tail* in remainder after the estates in *quasi tail* of the children, I need not, I think, consider or decide, though this would be equally effective in defeating any claim of the objectors, but it would not, like cross-remainders, preserve that equality amongst the children plainly intended by the parties.

If I am right in my decision so far, the other questions raised and argued become immaterial. But supposing I am wrong, the vendor puts forward another ground for defeating the objectors' claim.

By the provisions of the settlement already recited, the settlor charged all his real estate with the payment of £2,000 for the children of the marriage, in default of it being paid to the trustees by the settlor by annual sums of £100, which he thereby covenanted to pay during his life. When fourteen annual payments had become due, the trustees brought an action against the settlor, and obtained judgment for £1,400. But I am satisfied on the evidence that no part of this, or of the £2,000, or any interest thereon was ever paid in fact, and that no acknowledgment of liability was ever given, and objectors contend that all claim in respect of it is barred by statute. This would clearly be so unless what occurred after 1870 in this case has kept the debt alive.

Now, assuming that cross-remainders cannot be implied in this deed, or an estate in *quasi tail* in remainder in the mother, it is clear, as claimed by the objectors, that, on the death of each child without issue, and without having disposed of his or her



*Wylie, J.* share, such share would revert to the heir-at-law of Alexander  
1911. Murray, the elder, as special occupant. Therefore, on the death

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of Harriette on the 13th March, 1870, the heir-at-law became entitled to her one-sixth share. Another one-sixth share came to him in 1880, another in 1881, another in 1887, and another in 1894. But instead of his getting possession of these shares as they fell in, they were all taken possession of by the surviving children from time to time as each fell in, and, on the death of the last child in 1896, the vendor, claiming through her, got possession of all and kept it until the time of sale. It is obvious, therefore, that the heir-at-law and those claiming under him would now be barred of all claim to the lands had he not in 1880 put them into settlement, and the result of such settlement is admitted to be that, though the title to the share that fell in in 1870 is barred, the title to the other four-sixths is not barred. Therefore, the objectors who claim through the heir-at-law, would be entitled to four-sixths of the net residue of the purchase-money, if the £2,000 charge is barred, but if this is not barred, then, as it exceeds in amount the entire purchase-money, and belongs to the vendor, the objectors' claim would fail. The question, therefore, is, is this £2,000 charge barred?

Now, in the case of an equitable charge on a reversionary interest in land the statute does not begin to run till the interest falls into possession: see *Hugill v. Wilkinson* (1). But as they all fell in more than twelve years ago, and admittedly there has been no acknowledgment of the charge, it would be now barred, unless there was a payment of interest on it within twelve years. It is admitted there was no actual payment, but the vendor contends that there was constructive payment.

Now, for clearness, let us see what happened when the first share fell in in 1870. What happened to the share was this, that the five surviving children wrongfully took possession of it, received the rents and profits for their own use, and thereby became joint owners of it. And the same thing happened to the charge, because under the settlement the children were joint owners of the charge, and, on the death of one without severance,

the other five became owners of the whole. Therefore, the owners of the charge, who were entitled to be paid the interest, were also in receipt of the rents and profits of the share out of which the interest was payable, and this, according to the contention of the vendor, amounts to constructive payment. The same thing happened on the falling in of each of the other shares. The question, therefore, is whether, under these circumstances, there was a constructive payment of interest?

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Counsel for the objectors contends that the principle of constructive payment does not apply where the persons in receipt of the rents are under no duty or liability to pay the interest on the charge. This is no doubt so for the purpose of keeping the charge alive against property subject to the charge other than that which the person who is entitled to the charge is in possession of. But, no case has been cited, and I have found none, in which it was held that time runs against a charge in favour of a part of the land charged, where the rents and profits of such part have been received by the person entitled to the charge.

I think this distinction is clearly brought out in *In re England* (1). In that case a testator having covenanted for the payment of a sum of money after his death, to be held upon trusts under which his son was tenant for life, and charged the same with interest upon certain land, by his will devised the land, subject to the charge, to his son in fee. The money was never raised, nor was any interest actually paid in respect of it, but the son entered into possession of the land, and for more than twelve years received the rents and profits, and it was held that no presumption of any payment of interest by the son, on the ground of any duty to keep down the interest, could be made, he being owner in fee, and that, even if such payment could be presumed, it would not operate so as to prevent the statute from running in favour of testator's personal estate. But it was admitted in that case that the land remained liable.

The subsequent case of *Bassett v. Allen* (2) does not appear to me to be opposed to this distinction, as the decision in that case was based on the fact that the charge had been paid off,

(1) [1895] 2 Ch. 100.

(2) [1898] 2 Ch. 499.

*Wylie, J.* and the only claim remaining against the specifically devised land  
1911. was a claim to contribution of an unascertained sum, in respect of  
*In re* which it would have been impossible to presume a payment of  
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As has been laid down in several cases, in order that the statute should run, there must be a hand to pay distinct from the hand to receive. The hand to pay is the hand that receives the rents and profits out of which the interest is payable, and, in this case, was the same hand that was entitled to receive the interest on the charge: see *Topham v. Booth* (1), and *M'Carthy v. Daunt* (2).

In my opinion, therefore, even assuming that the heir-at-law of the settlor became entitled on the deaths of the children to their respective shares, the charge upon them is not barred because the persons entitled to the charge have always been in receipt of the rents and profits of the lands charged. And, though they were under no duty or obligation to pay the interest out of the rents and profits, it was obviously for their benefit so to apply them until they acquired by statute a title to the lands, and, therefore, it may be reasonably and fairly presumed that payment was made.

On both grounds, therefore, I think the objectors have no claim on the purchase-money, and I have no doubt such claim would never have been made if the Examiner had not raised the question.

Solicitors for the objectors: *Thomas Falls & Co.*

Solicitors for the vendor: *Montgomery and Chaytor.*

J. E. W.

(1) 35 Ch. D. 611.

(2) 11 Ir. Eq. R. 29.

## HOSFORD v. O'REGAN (1).

Appeal.  
1910.

Feb. 1.

*Labourers Acts—Improvement scheme—Exchange of plots—Application purporting to come from Rural District Council although no resolution authorizing it was passed—Contractor—Entry—Trespass—Lodgment of purchase-money in bulk sum.*

Where a Provisional Order was made by the Local Government Board sanctioning an improvement scheme by a Rural District Council, and it becoming desirable to exchange a plot which had been taken by the Council for another plot, the Local Government Board made a sealed order authorizing the exchange. This order was made in response to a letter of the Council's solicitor, but there was not any resolution of the Council authorizing such an application.

*Held*, that the order was void and did not render a subsequent entry by the contractor for the Council on the original plot a trespass.

Decision of Ross, J. [1909] 1 I. R. 367, reversed.

APPEAL by the defendant from the judgment of Ross, J [1909] 1 I. R. 367, where the case is fully reported.

*T. M. Healy, K.C.*, and *The Hon. Cecil Atkinson*, for the appellants.

*P. D. Fleming, K.C.*, and *Drumgoole*, for the respondent.

The arguments were the same as in the Court below.

THE LORD CHANCELLOR :—

We are unable to agree with the judgment of Ross, J. We think we must discharge his order on the ground that there was no resolution of the Rural District Council, and, therefore, nothing to ground the alteration of the site. [His Lordship read sect. 16 of the Labourers (Ireland) Act, 1886.] When the Local Government Board made their sealed order of May 12th, 1908,

(1) Before THE LORD CHANCELLOR, THE LORD CHIEF BARON, and HOLMES, L.J.



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they purported to make it on the application of the Rural District Council, who were the sanitary authority. That could only be done pursuant to a resolution of that body; but there is no resolution on which the order could be founded. The Local Government Board naturally thought that there had been such a resolution because they had received a letter from the solicitor for the Council. I am not surprised that he should have thought that such a resolution had been passed, having regard to the fluctuation of opinion in the Council. But we have to deal with the broad fact that no such resolution was passed. Therefore there is no basis for the sealed order; it is *ultra vires* and falls to the ground; it is entirely irregular. The contractor was informed by letter that unless he went on with the work he would be penalized. He went on the original site under his contract; but he was right in doing so if the order of the 12th May had no validity in law.

The second point, that the money should have been lodged separately in respect of each plot is not referred to in the pleadings. I think the lodgment in bulk was a sufficient compliance with the section. I think the section does not apply to cases where the person gives his consent to entry. There is no law on this part of the case; the acts of Reeves and Hosford show that they were consenting parties. The order below must be discharged. The action brought in this extraordinary way against O'Regan, instead of against his employers, the Council, ought to have been dismissed.

THE LORD CHIEF BARON concurred.

HOLMES, L.J. :—

The question in this case is, was the sealed order of the Local Government Board of the 12th May, 1908, a valid order? I think not, on one ground only to which I desire to confine my judgment, namely, that it purports to be founded on the application of the Rural District Council, and we find that no such document and no resolution of that body approving or directing such an application to be made is in existence. Their solicitor, acting under

some misapprehension, informed the Local Government Board that there was such a resolution. They assumed that this was so, and made an order which is *ultra vires*. Therefore we must disregard it altogether.

On the second point I think there is no doubt that the money was lodged so as to come within the provisions of the Act of Parliament.

I am sorry that the action was not brought against the real defendants. If it had been brought against them I doubt whether they ought to have got costs, even had they succeeded in the action; but as it has been brought against an innocent man, he ought to get all the costs below and here, including the costs of discovery and of the interlocutory injunction.

Solicitors for the appellants: *Wynne & Wynne*.

Solicitors for the respondent: *Bourke & Dorgan*.

W. G.

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Holmes, L.J.

IN RE FARIS, DECEASED, GODDARD *v.* OVEREND (No. 2).

M. R.

1911.

*Will—Construction—Codicil—Revocation—False assumption of fact—Inconsistent legacies.*

Jan. 19, 20.

The revocation of a bequest grounded on an assumption of fact which is false, takes effect, unless as a matter of construction the truth of the fact is the condition of the revocation.

A testatrix by the first codicil to her will directed certain legacies, bequeathed thereby, to be paid out of "my V. bonds." By a second codicil she stated "I find I have a sum of £700 V. stock which I have not put into my will, and I wish to be disposed of as follows," and then proceeded to make a number of bequests of the "V. stock," which was shown to be the same as the "V. bonds" referred to in the former instrument.

*Held*, that the bequest of "V. Stock" in the second codicil being grounded on the false assumption that the testatrix had not made any previous disposition of the stock, and being contingent and conditional on the truth of that assumption failed, and that the doctrine of revocation by inconsistent subsequent disposition did not apply.

ORIGINATING SUMMONS (1) taken out by the executor of the

(1) The present case is reported on another point at [1911] 1 L. R., p. 165.  
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deceased, to determine (*inter alia*), the following questions arising on the construction of the will :—

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1. Does the codicil dated the 23rd day of January, 1904, wholly or in part revoke the bequests, or any and which of them, bequeathed by the codicil dated 27th June, 1903 ?

2. If not, are the legacies bequeathed by the codicil dated 27th June, 1903, and thereby directed to be paid out of "my Victorian bonds" payable out of a sum of £700 inscribed stock of the Victorian Government, to which testatrix was entitled at the time of her death. And—in the event of the last-named security being insufficient to satisfy the said legacies—out of what fund (if any) is any deficiency in respect of same payable ?

Mary Jane Faris made her will, the terms of which are not material for the point dealt with by the present judgment on the 24th January, 1903.

She subsequently made a codicil to the said will on the 27th June, 1903, in the following terms :—

"I, Mary Jane Faris, of Mount Faris, Donard, county Wicklow, do make and declare this, as and for a codicil to my last will and testament, I give and bequeath the sum of one hundred pounds to my nephew, Edward Faris; the sum of one hundred pounds to my sister, Georgina Cathrew; the sum of one hundred pounds to my sister-in-law, Elizabeth Heighington; the sum of fifty pounds to my friend, Archdeacon Moore, of Carriek-on-Shannon; and the sum of fifty pounds to friend, Miss M. Hudson; the sum of one hundred pounds to my nephew, John Overend; the sum of fifty pounds to the National Hospital for Consumption, Dublin; the sum of fifty pounds to the Spiddal Orphanage Home; the sum of fifty pounds to my niece, Madge Hope; and the sum of fifty pounds to the Gleaners' Society of Donard; and I direct that these legacies shall be paid out of my Victorian Bonds, and in all other matters, I confirm my said will." On the 23rd January, 1904, the said Mary Jane Faris made a second codicil to her will in the following terms :—

"Codicil to my will. January 23rd, 1904. I find I have a sum of £700, Victoria 3 per cent. stock, which I have not put into my will, and I wish to be disposed of as follows: The Royal National Hospital

for Consumption, Ireland, fifty pounds; three hundred pounds to my nephew, E. W. Faris; fifty pounds to nephew Ralph Hope; to my friend Mrs. Moore, wife of Archdeacon Moore, Carrick-on-Shannon, fifty pounds; to my nephew, James Humphrey Cathrew, fifty pounds; to my sister-in-law E. E. Heighington, £100, my short gold chain and jade ring; I leave to E. E. Heighington, my sister-in-law, twenty-five pounds for her Donard Schools, to use as she wishes, and what she would wish to do with same money; to Rotunda Hospital, Rutland Square, twenty pounds; to Miss Coorane, Mrs. Moore's sister, twenty pounds; my gold brooch, to Sarah Heighington, Donard House; to Minnie Hodson, twenty pounds; twenty pounds I leave to my sister-in-law, E. Heighington, for anything required in Donard church to be done; my watch and chain to my dear friend, Fanny Bradshaw, daughter of Lieutenant-Colonel Bradshaw, Carrick-on-Shannon, county Leitrim."

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It was proved during the hearing that the securities referred to by the testatrix as "my Victorian bonds" in the first codicil were identical with the "sum of £700 Victoria 3 per cent. stock" mentioned in the second codicil.

*S. L. Brown, K.C.*, and *Phelps*, for the plaintiff, the executor.

*Garrett W. Walker, K.C.*, for the defendants John Overend and Mary Overend:—

The bequests of stock in the second codicil wholly fail, being made on a false assumption of fact. The testatrix did not wish to dispose of the stock, except upon the assumption that she had not disposed of it before *Thomas v. Howell* (1), *Campbell v. French* (2). The principle is similar to that of dependent relative revocation recognized in the Probate Jurisdiction.

*Jonathan Pim, K.C.*, for the defendant, Ralph Hope.

We admit the sums of stock are the same, but the legacies can be supported as demonstrative legacies; it is in effect a gift of legacies out of stock: *Roberts v. Pocock* (3).

(1) L. R. 18 Eq. 198, at p. 210.

(3) 4 Ves. 150.

(2) 3 Ves. 321.



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*Littledale, K.C.*, for George Faris, the residuary legatee:—

If this codicil is anything it is a specific bequest of Victoria stock. It is made under a false impression of fact. A bequest so made in a codicil will not operate to revoke a former bequest of the same subject-matter: *Barclay v. Maskelyne* (1).

*Serjeant O'Brien, K.C.*, and *Treacy*, for the defendant  
Ella M'Mahon.

*Denning*, for the defendant, Edward W. Faris.

*Jonathan Pim, K.C.*, in reply.

#### THE MASTER OF THE ROLLS:—

The identity of the Victorian securities referred to in the earlier codicil with those mentioned in the subsequent codicil has been demonstrated. It is manifest that the testatrix has dealt with the same securities in two different documents, and in wholly inconsistent ways. *Prima facie* the disposition made by the subsequent codicil revokes *pro tanto* the earlier instrument. But there has been a mistake somewhere. That is plain on the face of the two codicils. What effect has that mistake on the question of revocation? I think the answer is free from doubt.

Mr. Theobald, in the 7th edition of his valuable work, says (p. 750):—"It has been said that a revocation grounded on the assumption of a fact which turns out to be false does not take effect 'being, it is considered, conditional and dependent on a contingency which fails' (2). Probably the proposition is too broadly stated. There is little or no authority directly in point. The true view may be that a revocation grounded on an assumption of fact which is false takes effect unless, as a matter of construction, the truth of the fact is the condition of the revocation, or, in other words, unless the revocation is contingent upon the fact being true: see *Thomas v. Howell* (3)." I adopt that statement of the law, merely substituting for the words "may be" the word "is." The true view is, in my opinion, the view so clearly stated by Mr. Theobald.

(1) Jo. 124, at p. 131.

(2) 1 Jarm. 147.

(3) L. R. 18 Eq. 198.

I must, therefore, deal with the question of construction. The testatrix says:—"I find I have a sum of £700 Victorian £3 per cent. stock which I have not put into my will, and I wish to be disposed of as follows." The assumption of fact must be read as a whole, and the words "which I have not put into my will" are vital. The assumption of fact is false, because the testatrix had put her Victorian securities into her will. She had effectively dealt with them by the earlier codicil. The mere fact that it is false, however, does not, in my view, determine the matter. The question remains, "Was the truth of the fact the condition of the revocation?" I hold, as a matter of construction, that the truth of the fact in the recital or preamble was the condition of the subsequent disposition. The dominating words are those I have already emphasized. The disposition made by the later codicil is not merely based upon the assumption that the testatrix has not made any previous testamentary disposition of her Victorian securities, but is contingent and conditional upon the truth of the fact. The doctrine of revocation by inconsistent subsequent disposition does not apply. The disposition made by the earlier codicil takes effect.

*M. R.*  
1911.  
GODDARD  
v.  
OVEREND.

I give the various parties their costs.

Solicitor for the executor: *Norris Goddard.*

Solicitor for the defendants John Overend and Mary Overend: *T. T. L. Overend.*

Solicitor for the defendant Ella M'Mahon: *J. Perry.*

Solicitors for George Faris and Edward W. Faris: *Hoey & Denning.*

Solicitor for the defendant Ralph Hope: *T. T. L. Overend.*

A. E. C.



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**CHARITY** — *Will* — *Gift* — “Charitable or religious purposes” — *Gift to bishop of diocese and incumbent of parish for time being* — *Discretion of trustees as to application of trust fund* — *Validity*.]

By his will a testator devised and bequeathed the residue of his property real and personal to *W.*, the Bishop of Ossory, or other the bishop of that diocese for the time being, and *F.*, the incumbent of the parish of Carlow, or other the incumbent of that parish for the time being, upon trust to pay the interest, dividends, or annual proceeds of his residuary estate to his three sisters, and the survivors or survivor of them for life, “and from and after the decease of such survivor in trust to apply and dispose of such interest, dividends, or annual proceeds from time to time for the use of the Protestant Orphan Society of the county of Carlow, or for or towards the relief and benefit of such poor and necessitous Protestant widows and widowers resident in the county of Carlow, or to both of such objects or purposes, or to such other merely and purely charitable or religious purpose or purposes for the benefit of or advantage of members of the Church of Ireland, or other Protestant denominations, within the said county of Carlow, in such shares and proportions, and in such manner, as my said trustees shall in their uncontrollable discretion think fit.” *Held*, that the testator in the words “charitable or religious” had not shown an intention to enable the trustees to apply the gift to purposes religious but not charitable, and that the gift was a valid charitable gift; *In re Davidson, Minty v. Bourne* ([1909] 1 Ch., 567), distinguished. *In re Salter, deceased; Rea v. Crozier* - - - BARTON, J., 289

2. — *Will* — *Gift* — “Purposes of healthy recreation” — *Gift for public purposes for benefit of a particular town* — *Purpose beneficial to community* — *Overruling charitable purposes* — *Perpetuity* — *Inclusion of objects not charitable* — *Urban Council* — *Trusteeship*.] A testator devised and bequeathed all his real and personal property to *A.* and *B.* (whom he appointed executors of his will) and the Portadown Urban Council for the time being, in trust, to retain his property in its then form, and out of the income to keep his house property in good order and repair, and secondly to accumulate £100 per annum during the joint lives of *A.* and *B.*, and for twenty years after the survivor's death, for the purpose of forming a fund for the redemption of head rents on the trust property, or to be invested in trustee securities, which sum when it fell into the hands of the trustees of his will to be added to the capital sum then in hands, but, at the discretion of the trustees, at the end of every five years to apply the accumulations to augment the capital fund, and, in the third place, testator directed that £5 per annum should be

**CHARITY** — *continued*.

retained by the trustees for the purpose of a quinquennial dinner to “my trustees and the clerk of the Urban District Council for the time being,” and such others as the trustees should decide to invite, and testator directed that his will should be read and discussed at these dinners. Testator then directed that the balance of the income derived from his estate should be applied by his trustees “for the purpose of fostering, encouraging, and providing the means of healthy recreation, including the teaching of singing in classes or choruses, for the residents of the town of Portadown and the surrounding districts, and for the purpose of providing music and instruments (in so far as my trustees think advisable) for the town band, in such manner and form as my trustees in their absolute discretion consider best, but in no case shall my trustees pay away any moneys out of my estate for prizes for football or rowing for speed.”

*Held*, that the direction to the trustees as to the application of the balance or residue of the income of the trust estate constituted a valid charitable devise and bequest, being for a charitable and public purpose. *Held*, also, that the directions as to accumulation and as to the quinquennial dinners were subordinate and ancillary to the main general charitable purpose, and if any of the directions as to any of them failed, the income applicable thereto would fall into the residue and be available for the main charitable object. *Held*, also, that the direction as to the town band was not a gift for the benefit of the band, but was a particular way of carrying out a general public and charitable purpose for the benefit of the town and neighbourhood. *Held*, also, that the Urban Council could not hold lands as devisees in trust in the manner contemplated by the will, and that the Court would effectuate testator's intentions by settlement of a scheme which would provide if necessary for the appointment of trustees, and would have regard to the fitness of the Council to assist in carrying out a trust for the benefit of the town and neighbourhood. *Skillington v. Portadown Urban District Council*

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defendants, executors of deceased, claimed priority for their costs of suit, as against a secured creditor who had established a charge upon a fund which had been realized in connexion with a sale in another suit, and had been brought into Court and carried to a separate account. *Held*, that they could only claim priority for such of their costs of suit as were relative to the separate account. *Bell v. Butterly* - - - BAXTON, J., 312

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**DISTRICT LUNATIC ASYLUM**—*continued.* *virtute officii.*] Up to the 31st December, 1897, the maintenance of the lunatic poor in the several district lunatic asylums in Ireland was supplied by capitation grants provided in the Appropriation Act of each year, each such Act covering the calendar year immediately preceding up to the 31st December. In this way the cost of maintaining such lunatic paupers in the Richmond Asylum, with which the Dublin Corporation, in conjunction with three counties, were chargeable, was paid up to the 31st December, 1897. By the Local Government (Ireland) Act, 1898, the control of such asylums was transferred to the county councils thereby created, including the Corporation of Dublin; the capitation grants by Appropriation Acts were to cease, and, *inter alia*, a sum was annually to be paid from the Consolidated Fund to an account called the Local Taxation (Ireland) Account equal to the amount of the duties ascertained to be the proceeds in the previous financial year of the duties collected in Ireland on certain taxation licences, and the Lord Lieutenant of Ireland was directed to pay in respect of each local financial year out of this account to the county councils, four shillings per head per week for each pauper lunatic in a lunatic asylum managed and conducted to his satisfaction. The financial year was from the 1st April to the following 31st March (sect. 59), and by the Local Government (Application of Enactments) Order, 1898, schedule and article 19, the accounts of county councils, their committees and officers, were directed to be made up yearly to the 31st March in each year, thus abrogating the provisions of the Lunatic Asylums (Ireland) Accounts Audit Act, 1868 (31 & 32 Vict. c. 97), sect. 5, under which the accounts of asylums were made up to the 31st December in each year. Following on this legislation, the first yearly payment out of the Local Taxation (Ireland) Account was made in the year 1899 in respect of the cost incurred in the year ending the 31st December, 1898, and the subsequent payments were made in respect of each previous financial year calculated from the 1st April to the 31st March, leaving the three months from the 1st January, 1899, to the 31st March, 1899, unprovided for. This having apparently attracted the notice of the Legislature, by the Appropriation Act, 1900 (63 & 64 Vict. c. 57, schedule B, part 13, No. 5), a sum of £37,030 was paid into the Local Taxation (Ireland) Account. The estimate on which the Act was based showed that the object was to recoup that account for a payment of a like amount assumed to have been paid thereout, or at least chargeable thereon for the three months from the 1st January to the 31st March, 1898. The Lord Lieutenant, however, acting on the advice of his legal advisers, declined to apply any portion of the additional sum paid



**DISTRICT LUNATIC ASYLUM**—*continued.*  
to the Local Taxation (Ireland) Account in the recoupment of the county councils, including the Dublin Corporation, for their expenses of maintenance of pauper lunatics during the first quarter of 1899, notwithstanding a prolonged correspondence between the Corporation and the Under Secretary to the Lord Lieutenant, in which each party propounded their views. Eventually the Corporation presented a petition of right which was flated by His late Majesty King Edward 7, claiming £3059 0s. 1d., which was admittedly their proportion of the amount (if any) to be recouped. *Held*, by Barton, J., and the Court of Appeal that the suppliants were entitled to the relief prayed. The views expressed by the Lord Chief Baron in *Kildare County Council v. The King* ([1909] 2 I.R. 199) as to the cases in which a petition of right is the proper remedy, approved of and followed. *Lord Mayor, &c., of Dublin v. The King*

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**FAILURE OF ISSUE**—Will—Construction—*Devise in tail—Wills Act* (1 Vict. c. 26), s. 29—*Contrary intention—Absolute interest in chattels real.*] A testator, after the Wills Act, and describing each gift as of “all my right, title, and interest” therein, devised and bequeathed real estate to his eldest son *J.*, and to his heirs lawfully begotten. He also bequeathed to *J.* chattels real; and declared that, in case *J.* should die without issue lawfully begotten, the lands devised and bequeathed to him should revert to testator’s second son *T.*, and his heirs lawfully begotten. The testator bequeathed to *T.* chattels real, and declared that, in case *T.* should die without issue lawfully begotten, the lands bequeathed to him were to revert to *J.* Testator further declared that in case *J.* or *T.* should die without issue lawfully begotten, the entire of the said lands should be the property of the survivor or longest liver of them, and that in case both should die without issue, the said lands should revert to the testator’s daughter *R.*, and her heirs lawfully begotten, and that in case *J.*, *T.*, and *R.* should all die without lawful issue, the lands devised and bequeathed to *J.* should revert to the second son of testator’s brother *A.* and to his lawful heirs, but in failure of such issue, then to the next son in priority of age, and so on successively in remainder, and the lands bequeathed to *T.* should revert to testator’s brother *B.*’s eldest son and his heirs lawfully begotten, but in failure of such to his second or third son by priority of ages, and so on successively in remainder. And the testator declared it to be his will that neither *J.* nor *T.* should sell or dispose of any part of the said lands, but that same should remain the *bona fide* properties of them and their heirs for ever. *Held*, by Ross, J., and by the Lord Chancellor and Cherry, L.J., affirming his decision, that on the true construction of the will, the operation of sect. 29 of the Wills Act was excluded; that the words “die without issue lawfully begotten” meant indefinite failure of issue; and that consequently under the terms of the bequests of the chattels real, which would have conferred estates tail in real estate, *J.* and *T.* took absolute interests in the chattels real respectively bequeathed to them. *Held*, by Holmes, L.J., that the 29th section of the Wills Act applied to the bequests of the

**FAILURE OF ISSUE**—*continued.*

chattels real, and that *J.* and *T.* each took an absolute estate in the chattels real bequeathed to them, with an executory bequest to his brother in the event of failure of issue at the time of his death, and with a further executory bequest of all the chattels real to *R.* in the event of failure of issue of both *J.* and *T.* at the times of their respective deaths, with a final executory bequest to the testator's nephews in the event of failure of issue of *R.* at the time of her death. *Weldon v. Weldon* - - - Ross, J., 177; *APP.* 184

**FAIR RENT**—*Land Purchase Acts—Irish Land*

*Act, 1909 (9 Edw. 7, c. 42)—Bonus Schedule—Judicial rent fixed or agreed to since the passing of the Act of 1896—Bona fide transaction—Purchase agreement entered into between the date of lodgment of fair rent agreement and date of filing thereof.]* In order to entitle a vendor, selling under the Land Purchase Acts, to a bonus calculated under the first column of the Bonus Schedule to the Irish Land Act, 1909, the agreement fixing the judicial rent of the holding for a second term must be a real and bona fide transaction intended to be acted upon if the sale should fall through, and not one entered into for the sole and indirect object of increasing the amount of the bonus. The fact that the purchase agreement is entered into between the date of the lodgment of the fair rent agreement with the Land Commission, and the date of the filing thereof, does not *per se* prevent the latter from being treated as a judicial rent, fixed or agreed to since the passing of the Act of 1896, for the purposes of the Bonus Schedule. *Quare*, where a second-term judicial rent is bona fide fixed, does the fact that it is of the same amount as the first-term rent prevent the case from coming under the first column of the Bonus Schedule, in the event of the sale of the holding being carried out under the Land Purchase Acts? *In re O'Gorman's Estate* WYLLIE, J., 243

— Leasehold whether incorporated with demesne  
— Severance - - - 418  
*See DEMESNE LAND.*

**FEE-FARM GRANT**—*Perpetuity—Renewable Leasehold Conversion Act, 1849 (12 & 13 Vict. c. 105)—Fee-farm grant—Covenant to fine down rent to a peppercorn, and to accept sixteen years' purchase of rent reserved.]* A covenant in a fee-farm grant made pursuant to the Renewable Leasehold Conversion Act (12 & 13 Vict. c. 105), giving liberty to the grantee, his heirs, and assigns, to fine down the rent to a peppercorn, upon payment of sixteen years' purchase of the rent, is not void as offending against the rule against perpetuities. *In re Garde Browne* - - - L. C. 205

2. — *Under Renewable Leasehold Conversion Act, 1849 (12 & 13 Vict. c. 105)—Habendum—*

**FEE-FARM GRANT**—*continued.*

*Omission of words of limitation—Estate in fee-simple—Intention.]* The Renewable Leasehold Conversion Act contemplates an estate in fee-simple being vested in the grantee. Where, therefore, in the habendum to a fee-farm grant made pursuant to the provisions of the said Act, words of limitation were omitted as regards certain of the grantees:—*Held*, having regard to the intention, that the grantees took an estate in fee-simple in the lands. *In re Johnston's Estate; Elliott, Petitioner* [Ross, J., 215.]

— Rent—Non-payment—Extinction - 271  
*See LIMITATIONS, STATUTE OF.* 1.  
— Sale under Land Purchase Acts—Redemption price of reversion in Crown—By whom payable - - - 431  
*See SUPERIOR INTEREST.* 3.  
— Sale under Land Purchase Acts—Redemption prices of tithe rentcharge and fee-farm rent—Priority - - - 317  
*See TITHE RENTCHARGE.*

**FINING DOWN RENT**—Covenant in fee-farm grant—No limit as to time—Perpetuity  
*See FEE-FARM GRANT.* 1. [205]

**FISHERY ACTS**—*Drift-net fishing for salmon—Public right of fishing in tidal and navigable channel—Nuisance to several fishery—Fixed net or engine—Damage caused by the acts of several persons, each independently engaged in doing what by itself is lawful.]* The Irish Society are entitled, under a charter of King Charles II., to a several fishery in Lough Foyle, which is approached from the open sea by two channels north and south of a sand bank. The north channel, which is about three-quarters of a mile wide, and outside the limits of the Society's fishery, has been for many years fished for salmon by drift-nets at night from the second week in June to the last week in July. Those nets are from 600 to 1000 yards in length, and 15 feet in depth; corks are attached to a light rope at the top, and leaden weights are suspended from the bottom of the net. Each net is worked by a boat to which it is attached by a rope. The nets are usually shot out at the last hour of the ebb-tide if it occurs at night, and at first hang in a perpendicular position across the part of the channel they occupy, but drift with the tide, until they are straight up and down channel, when they are boarded. Only two casts can be made of a night. So long as the net is straight across the channel or slantwise, the fish strike the net, push their head through the meshes, and get entangled by their gill covers. When many boats were working, they used to shoot alternately from either side of the channel, and the nets would overlap. Very large quantities

**FISHERY ACTS**—*continued.*

of fish were taken by these nets. The number of nets varied from night to night during the season. In that of 1908, the maximum was twenty-nine and the minimum six. In an action by the Attorney-General, at the relation of the Society and the lessees of their several fishery, for an injunction to restrain the drift-net fishing for salmon, the defendants relied on their right as members of the public to capture as many salmon as they could by methods which were not illegal. *Held*, by Meredith, M.R., and by the Court of Appeal, affirming his judgment, that the method of fishing adopted by the defendants and others of the public was not a nuisance at Common Law; and that the nets used were not illegal as being "fixed nets" or "fixed engines" within the meaning of the Irish Fisheries Code. The use of drift-nets for the capture of salmon in Ireland is legal. *The Duke of Atholl v. Glover Incorporation of Perth* ([1900] A. C. 403) does not apply to Ireland. *Irish Society v. Fleming*

[M. R. 323; App. 353 [App.]]

**FIXED NET OR ENGINE**—Drift-net

See FISHERY ACTS. [323, 353]

**FRAUD**—Systematic—Pleading—Evidence 306  
See PLEADING.**GIFT**—Husband and wife—Transfer of wife's money into joint names - - 281  
See HUSBAND AND WIFE.

**GIFT OVER**—Will—Legatee—Attestation by legatee—Failure of prior gift—Acceleration—Wills Act, 1837 (1 Vict. c. 26), s. 15.] A testator made a bequest of chattels real to T., with a gift over in the event of his dying without issue to J. and K. T. attested the execution of the will, so that the bequest to him became void. He was alive and unmarried. There was no residuary gift in the will. *Held*, that the gift over to J. and K. was not accelerated, and that it was only in the event of the death of T. without issue that they would be entitled to the chattels real. Judgment of Barton, J., affirmed by Court of Appeal. *Kearney v. Kearney* - - - BARTON, J., 137; App. 143

**GRAFT**—Evicted Tenants (Ireland) Act, 1907 (7 Edw. 7, c. 56)—Person nominated by Estates Commissioners as personal representatives of deceased evicted tenant—Trustee.] Where the Estates Commissioners, under the provisions of the Evicted Tenants (Ireland) Act, 1907, vest a holding in a person nominated by them as personal representative of a tenant of a holding formerly occupied by an evicted tenant, such person is a trustee of the holding for the next-of-kin of the evicted tenant. *Coyle v. Coyle* - - - Ross, J., 120

**HABENDUM**—Fee-farm grant—Omission of words of limitation - - - 215  
See FEE-FARM GRANT. 2.

**HEAD-RENTS**

See SUPERIOR INTEREST.

**HUSBAND AND WIFE**—Benefit conferred on husband by wife out of her own property—Transfer of wife's money into joint names of husband and wife—Intention—Evidence—Joint tenancy.] A, who carried on business in a small shop and was possessed of £1200 in money, married B., a workman earning wages. According to evidence which the Court believed and acted upon, A, both before and after marriage, announced her intention, in the presence of B., of putting the £1200 in their joint names, to become the property of the survivor; and she did, in fact, a few days after the marriage, without any solicitation or pressure by B., lodge the money on deposit receipt in the joint names of A. and B.; and in answer to the question, "Whose the money was to be?" she said in her evidence, "On both our names to work on it as husband and wife should." After the marriage B. paid his wages to A., and the money on deposit receipt was drawn on from time to time as required for the shop or other expenses, the profits of the shop being lodged from time to time on deposit receipt in the names of A. and B. *Held*, that the money so lodged on deposit receipt was the joint property of A. and B. during their joint lives, and would become the absolute property of the survivor of them. *Foley v. Foley* - - - App. 281

— Purchase in trust—Land Law Acts 444, 447  
See TRUSTEE.

**INDORSEMENT**—Order for injunction—When unnecessary - - - 402  
See ATTACHMENT.

**INFANT**—Interest on portions—Ward of Court  
See PORTIONS. 2. [144]

**INJUNCTION**—Against trespass—Absence of indorsement on order served - 402  
See ATTACHMENT.

**INSOLVENT ESTATE**—Absolute order for sale—Bonus - - - 301, 304  
See BONUS. 1.

— Administration action—Mortgage—Separate audit—Costs—Priority - - 312  
See COSTS.

— Sale under Land Purchase Acts—Fee-farm rent—Tithe rentcharge—Redemption—Priority - - - 317  
See TITHE RENTCHARGE.

**INTEREST ON MONEY**—Equitable charge—Bequest of - - - 165  
See LEGACY.



**INTEREST ON MONEY**—*continued.*

- Equitable charge—Owners of, in possession under mistake of title—Constructive payment of interest - - - 453  
See LIMITATIONS, STATUTE OF. 2.
- Mortgage—Arrears of interest statute-barred—Sale under Land Acts - - - 16  
See MORTGAGE. 2.
- Mortgage—Bequest of - - - 165  
See MORTGAGE. 3.
- Portions—Accumulations—Ward of Court  
See PORTIONS. [144]

**INVESTMENT**—Head-rents—Purchased under Land Acts - - - 297  
See SUPERIOR INTEREST. 2.

**ISSUE**—Failure of—Wills Act, s. 29—Contrary intention - - - 177, 184  
See FAILURE OF ISSUE.

**JOINT TENANCY**—Transfer by wife of money into joint names of herself and husband  
See HUSBAND AND WIFE. [281]

**JUDICIAL RENT.**  
See FAIR RENT.

**JURISDICTION**—Estates Commissioners.  
See ESTATES COMMISSIONERS.

**LABOURERS ACTS**—*Improvement scheme—Exchange of plots—Application purporting to come from Rural District Council although no resolution authorizing it was passed—Contractor—Entry—Trespass—Lodgment of purchase-money in bulk sum.* Where a Provisional Order was made by the Local Government Board sanctioning an improvement scheme by a Rural District Council, and it becoming desirable to exchange a plot which had been taken by the Council for another plot, the Local Government Board made a sealed order authorizing the exchange. This order was made in response to a letter of the Council's solicitor, but there was not any resolution of the Council authorizing such an application. *Held*, that the order was void and did not render a subsequent entry by the contractor for the Council on the original plot a trespass. Decision of Ross, J. ([1909] 1 I. R. 367), reversed. *Hosford v. O'Regan*. [APP. 467]

— Erection of cottages—District Council contractor—Right to enter on land and carry away stones—Blasting - - - 1  
See DISTRICT COUNCIL.

**LAND LAW (IRELAND) ACTS**—Bonus.  
See BONUS.

— Congested Estate—Power to determine tenancies - - - 42  
See CONGESTED ESTATE.

**LAND LAW (IRELAND) ACTS**—*continued.*

- Demesne—Leasehold whether incorporated with—Severance - - - 418  
See DEMESNE LAND.
- Estates Commissioners.  
See ESTATES COMMISSIONERS.
- Evicted tenant—Graft - - - 120  
See GRAFT.
- Fair rent—Purchase agreement entered into between date of lodgment and filing of agreement fixing—Fixed to obtain enhanced bonus - - - 243  
See FAIR RENT.
- Mortgage—Arrears of interest—Statute of Limitations - - - 16  
See MORTGAGE. 2.
- Purchase in trust—Declaration—When and to whom to be made—Purchase by husband and wife—Limit on advances  
See TRUSTEE. [444, 447]
- Reversion in Crown—Redemption price of—Fee-farm grant—Sale under Land Purchase Acts—Liability of grantee 431  
See SUPERIOR INTEREST. 3.
- Sale of holding subject to annuity—Non-registration of purchaser 125, 130  
See LOCAL REGISTRATION OF TITLE.
- Superior interest—Price whether sufficient to redeem—Estates Commissioners—Jurisdiction to proceed with sale 218, 227  
See SUPERIOR INTEREST. 1.
- Superior interest—Purchase of head-rents—Investment - - - 297  
See SUPERIOR INTEREST. 2.
- Tithe rentcharge—Redemption—Fee-farm grant—Priority - - - 317  
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**LANDLORD AND TENANT**—Fee-farm grant—Covenant to fine down rent—Perpetuity - - - 205  
See FEE-FARM GRANT. 1.

— Fee-farm grant—*Habendum*—Omission of words of limitation - - - 215  
See FEE-FARM GRANT. 2.

— Fee-farm grant—Rent—Non-payment—Extinction - - - 271  
See LIMITATIONS, STATUTE OF. 1.

— Fee-farm grant—Reversion in Crown—Redemption price, by whom payable 431  
See SUPERIOR INTEREST. 3.

— Fee-farm grant—Sale under Land Purchase Acts—Rent—Tithe rentcharge—Redemption—Priority - - - 317  
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**LANDLORD AND TENANT—continued.**

— Land Law (Ireland) and Land Purchase Acts.

See LAND LAW (IRELAND) ACTS.

— Lease.

See LEASE.

**LEASE**—Incorporation of demised premises with demesne—Severance - - 418  
See DEMESNE LAND.

— *Pur autre vie*—Settlement—Equitable estate—Implication of cross-remainders 453  
See CROSS-REMAINDERS.

**LEGACY**—*Will*—*Construction*—*Charge*—*Interest*.] A testatrix made a bequest in the following terms:—"As to the charge affecting the D. estate . . . of which only £1000 is disposable under the terms of my marriage settlement, I direct that my executor shall hold it in trust" for certain persons in certain shares, which she thereby declared. Under her marriage settlement she had power to dispose of a sum of £1000, part of a charge of £1500. *Held*, that interest due to the testatrix at her death upon the charge did not pass to the legatees under the terms of the bequest. *In re Paris, deceased*; *Goddard v. Overend*

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— Accretion to—Stockholder—Bonus - 165  
See ACCRETION TO LEGACY.

— Charitable.

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— Legatee attesting will—Gift over, whether accelerated - - - 137, 143  
See GIFT OVER.

— Mortgage—Interest - - - 165  
See MORTGAGE. 3.

— Revocation of—False assumption of fact 469  
See REVOCATION.

— Satisfaction of portion by - - 113  
See SATISFACTION.

— "Ten per cent. of my money"—Charitable bequest - - - 263  
See MONEY.

**LIBEL**—Particulars—Delivery before defence 69  
See PARTICULARS.

**LIMIT ON ADVANCES**—Land Law Acts—Purchase in trust—Declaration 444, 447  
See TRUSTEE.

**LIMITATIONS, STATUTE OF**—3 & 4 Wm. 4, c. 27, s. 2—*Fee-farm rent*—*Renewable Leasehold Conversion Act, 1849* (12 & 13 Vict. c. 105)—*Non-payment*—*Extinction*.] A fee-farm rent created by and payable under a fee-farm grant made in pursuance of the Renewable Leasehold Conversion Act, 1849, is a rentcharge and not a rent service. Where such a rent had remained unpaid for more

**LIMITATIONS, STATUTE OF—continued.**

than twelve years, and no acknowledgment had been given in respect thereof, the same was held to be barred by the Statutes of Limitations (3 & 4 Wm. 4, c. 27, and 37 & 38 Vict. c. 57). *In re Mannell's Estate* - - - - - Ross, J., 271

2.—*Possession of land under mistaken title*—*Owner of equitable charge*—*Constructive payments of interest*.] Where the owners of an equitable charge on land had, under an assumption of title to the land as tenants in tail, entered into receipt of the rents and profits, constructive payment of interest on the charge will be presumed, so as to prevent it being barred, it being for their benefit to pay such interest until they had acquired by statute a title to the lands. *In re Battersby's Estate* - - - - - WYLIE, J., 453

— Mortgage—Arrears of interest—Sale under Land Acts - - - - 16  
See MORTGAGE. 2.

— Mortgage—Claim in administration action—Acknowledgment - - - 153  
See MORTGAGE. 1.

**LOCAL GOVERNMENT**—District lunatic asylum—Maintenance of pauper lunatics—Capitation grant - - - 83, 102  
See DISTRICT LUNATIC ASYLUM.

**LOCAL REGISTRATION OF TITLE—Will**

—*Charitable devise*—*Estate in lands*—*Death of testator within three months*—*Registration*—*Estate passing*—7 & 8 Vict. c. 97, s. 16—*Local Registration of Title (Ireland) Act, 1891, sects. 25 and 35.*] A., the owner in fee of lands purchased by him (prior to the passing of the Local Registration (Ireland) Act, 1891), under the provisions of the Irish Land Purchase Acts, subject to an annuity to the Irish Land Commission, purported to divide the lands into four lots, which in 1905 he sold to purchasers, subject to apportioned parts of the annuity, the sale in each case being made subject to the consent of the Irish Land Commission being obtained to such subdivision and apportionment, and power being reserved to the vendor to annul the sale in case such consent should be withheld. Subsequently, each purchaser was let into occupation of his portion of the lands under an agreement which provided that he was to be regarded as in possession temporarily only, and that in the event of the sale being annulled he should be chargeable with an occupation rent. A., who had never been registered as owner of the lands under the Local Registration of Title (Ireland) Act, 1891, died prior to the consent of the Irish Land Commission being obtained to the said subdivision, having on the day prior to his death executed a will, by which, without expressly referring to the said lands, or the purchase-moneys

**LOCAL REGISTRATION OF TITLE**—*contd.* payable therefor, he devised and bequeathed the residue of his property for charitable purposes. Some time after the testator's death, the consent of the Irish Land Commission having been then obtained to the said sub-division, the executors of his will were registered as owners of the lands, and, thereupon, executed transfers to the four purchasers, each of whom became registered as owner of the portion of the lands purchased by him. *Held*, by the Court of Appeal (affirming the decision of the Master of the Rolls), that the testator had an "estate" in the lands at the time of his death, within the meaning of section 16 of 7 & 8 Vict. c. 97; and that, accordingly, the residuary devise of the said lands for charitable purposes failed. *In re Mooney; Mooney v. M'Mahon* - - - M.R. 125; App. 130

**LOCO PARENTIS**—Person in—Voluntary gift by deed—Subsequent legacy - 113  
*See* SATISFACTION.

**LORD LIEUTENANT**—Money under control of, *virtute officii*—Petition of right 83,  
*See* DISTRICT LUNATIC ASYLUM. [102]

**LUNATIC ASYLUM.**

*See* DISTRICT LUNATIC ASYLUM.

**MAINTENANCE**—*Will—Construction—Gift to wife* "for life for her own maintenance and the maintenance and advancement in life" of testator's children—*Right of adult children to maintenance during life of widow.*] A testator gave all his property to trustees upon trust to permit his wife to occupy the mansion-house during her life, and, after payment of outgoings, to pay the net rents and profits of the property to his wife, "for life for her own maintenance and the maintenance and advancement in life" of his children, and, after his wife's decease, in trust for his eldest and other sons in tail male with further remainders, and, in the event of his wife predeceasing him or dying during the minority of his children, testator made further provision for the maintenance and advancement of his children until their attaining the age of twenty-one years or marrying, and testator made further provision for his younger children. *Held*, that the wife took the income subject to a trust for the maintenance and advancement of the children during the mother's lifetime so long as they should require same. The children other than the eldest son being provided for, the eldest son, the tenant in tail male in remainder, subject to his mother's life interest, who had married, and, at the desire of his mother, had left the parental home, but who was unprovided for, issued a summons to determine what provision should be made for him out of his mother's income. The Court directed the inquiry asked for. *K' Eogh v. K' Eogh*

[Ross, J., 396]

**MERGER**—Successive tenants for life—Transfer by first to second - - - 76  
*See* SETTLED LAND ACTS. 1.

**MISTAKE**—Revocation of bequest - 469  
*See* REVOCATION.

**MONEY**—*Will—Construction—Charitable legacy of "10 per cent. of my money."*] A testator gave 10 per cent. of his money in charity, and bequeathed the rest of his money to his children, share and share alike. *Held*, that "money" included, besides money at testator's call, Consols, stocks that could be immediately turned into cash, and arrears of rent of real and personal estate belonging to the testator, but not capital sums secured by mortgages. *O'Connor v. O'Connor* - App. 263

**MORTGAGE**—*Acknowledgment—Statute of Limitations—3 & 4 Wm. 4, c. 27, ss. 2, 40; 37 & 38 Vict. c. 57, ss. 1, 8.*] A claim by a legal mortgagee for payment of principal and interest due on his mortgage, brought in a suit for the administration of the real and personal estate of a deceased owner of the equity of redemption, is a proceeding to recover money secured by a mortgage charged upon or payable out of the land, within sect. 8 of the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), and not an action or suit to recover the land, within sect. 1 of that Act, and consequently the mortgagee in such case can rely upon an acknowledgment of his right given in writing by the agent of the owner of the equity of redemption, as keeping alive a mortgage debt, which would otherwise have become statute-barred. *In re Lloyd, deceased; Waters v. Lloyd*

[App. 153]

2. — *Arrears of interest—Land Purchase Acts—Sale of incumbered lands—Statute of Limitations—3 & 4 Wm. 4, c. 27, s. 42.*] Where lands are sold under the provisions of the Irish Land Act, 1903, the owner of an incumbrance or charge upon such lands, portion of the arrears of interest due upon which has become statute-barred, is only entitled to be paid out of the purchase-money the arrears of interest which accrued during the six years prior to the payment of the purchase-money into the Bank of Ireland, and the order attaching claims thereto, under sect. 24, sub-sect. 1, of the Irish Land Act, 1903, together with all further interest accrued since that date. *In re Blennerhassett's Estate* - - - App. 16

3. — *Bequest—Will—Construction—Interest, whether passing to legatee.*] A testatrix devised and bequeathed to G., E., and F., her two mortgages for £1000 and £900 respectively, then affecting certain estates, for their own use absolutely in equal shares, share and share alike

**MORTGAGE**—*continued.*

*Held*, that interest due to the testatrix under the two mortgages at her death passed with the principal to the legatees. *In Paris, deceased; Goddard v. Overend* - - - M. R. 165

4. — *Notice parties—Action for sale by puisne mortgagee—Service of order on prior mortgagee—Application for lodgment of title-deeds—R. S. C. Ir., 1905, Order XVI, Rule 40.*] Order XVI, Rule 40, applies in the case of an order for sale of lands made in an action brought by a puisne mortgagee against the mortgagor for the sale of the mortgaged lands, and the Court has jurisdiction under this rule to direct the prior mortgagee to be served with notice of the order. A prior mortgagee having been served with notice of the order for sale, the plaintiff applied for an order that the prior mortgagee should lodge the title-deeds in his possession in Court, and that they should be delivered to the plaintiff's solicitors: the prior mortgagee was willing to produce the deeds and let copies be taken pursuant to s. 16 of the Conveyancing Act, 1881. No steps had been taken under the order for sale. The Court, having regard to the offer of the prior mortgagee, declined to make any order. *Armstrong v. Dickson* - - - M. R. 435

5. — *Practice—Order for possession—Delivery of possession by mortgagor to mortgagee—Exercise of jurisdiction—Order LV, Rule 7.*] The words "delivery of possession by the mortgagor" in Order LV, Rule 7, are not to be read as merely ancillary to a sale ordered by the Court. The Court will in a proper case make an order for the delivery of possession of the mortgaged premises by the mortgagor to the mortgagee, apart from any proceedings for sale. *Semble*, such an order will not be made as a matter of course. *Bank of Ireland v. Slattery* - - - M. R. 33

— Insolvent townland—Bonus - - - 11

*See* Bonus. 2.

— Realization — Administration action—Separate credit—Costs—Priority - - - 312  
*See* Costs.

**NEXT-OF-KIN**—Evicted tenant—Nominee of Estates Commissioners - - - 120  
*See* GRAFT.

— Power to appoint to relatives—Default of appointment—Time for ascertaining class  
*See* Power. [405, 410]

**NOMINEE**—Of Estates Commissioners—Evicted holding—Graft - - - 120  
*See* GRAFT.

**NOTICE PARTIES** — Mortgagee's suit —  
Practice - - - 435  
*See* MORTGAGE. 4.

**NUISANCE**—Several fishery—Drift-net fishing exercised by several persons acting independently - - - 323, 358  
*See* FISHERY ACTS.

**ORDERS, GENERAL**—1905 (22nd February), XVI., R. 40 - - - 436  
*See* MORTGAGE. 4.

— XLI., R. 4 - - - 402

*See* ATTACHMENT.

— LV., R. 3 (1), (2) - - - 434

*See* PAYMENT OUT OF COURT.

— LV., R. 7 - - - 33

*See* MORTGAGE. 5.

**PARTICULARS** — *Practice — Pleading — Motion for particulars — Delivery of particulars before defence—Libel—Insurance company.*] In an action brought by the P. Assurance Company against A., B., and C., the trustees of the L. Insurance Society, and D., E., and F., certain agents of the L. Society, to restrain them from interfering with the business of the P. Company, the statement of claim alleged (*inter alia*) that "the said D., E., F., and other agents and servants of the L. Society, at the instigation of the said society and of the said D., E., and F., have for the purpose of inducing the policy-holders of the P. Company to cease insuring with the P. Company, and to transfer their insurances to the L. Society, made grossly false statements and representations to the policy-holders in the P. Company" to a certain effect, and that "D., E., and F. also themselves circulated among the policy-holders in the P. Company, and caused to be circulated by other agents and servants of the L. Society, a grossly libellous notice or circular imputing certain charges against the P. Company, and that the said notice or circular letter continues to be circulated among the policy-holders of the P. Company by the said D., E., and F." *Held*, that before delivering their defence, A., B., and C. were entitled to obtain from the plaintiffs further and better particulars as to (1) the person by whom, (2) the localities in which, and (3) the period within which, the alleged grossly false statements and representations were made, and also particulars as to whether any of the policy-holders to whom it was alleged the false representations were made were resident outside a certain district named by the plaintiffs, but that they were not entitled to receive particulars of the names and addresses of the several persons to whom the false representations were made. *British Legal and United Provident Assurance Co. v. Sheffield* - - - M. R. 69

**PARTIES**—Action by mortgagee for sale - - - 435  
*See* MORTGAGE. 4.



**PATENT** — *Licence — Royalties — Transfer — “Two-member” company.*] A clause in a licence agreement for the use of certain patents provided that “the said licensee may . . . transfer the said licence to any limited liability company he may form to carry on his business, or the business connected with and arising out of said patents and this licence.” *Held*, that the licensee could not under this clause rid himself of liability for royalties due under the licence agreement, by transferring the licence to a company formed, not for the purpose of carrying on his business, or of working the patents, but merely with a view to ridding him of such liability. *Cummings v. Stewart* [M.R. 236]

**PAYMENT**—Of interest on equitable charge—Constructive—Owners of charge in possession of estate under mistake of title  
See **LIMITATIONS, STATUTE OF.** 2. [453]

**PAYMENT OUT OF COURT** — *Practice — Trustee Relief Act—Fund exceeding £500—Title depending only on proof of identity and age of applicant—R.S.C. (Ir.), 1905, Ord. LV, Rule 3 (1), (2).*] An application for payment out of a fund exceeding £500 lodged in Court under the Trustee Relief Act should be made on motion, although the title of the applicant depends only on proof of identity and age. *In re Campbell’s Trusts*, 31 L.R. (Ir.) 434, not followed. *In re Sitwell* M.R. 434

**PERPETUITY**—Grant of rentcharge for long term of years for charitable purposes—Proviso as to redemption—No limit as to time for redemption.] By an indenture made in 1747 an annuity or yearly rentcharge of £15 issuing out of certain lands was granted to *M. J.* and *J. B.*, and the survivor of them, and the executors, administrators, and assigns of the survivor, for the term of 999 years, from the death of the grantor, which said annuity was subsequently declared to be upon trust for *J. P.*, or such other person as for the time being should have the pastoral care of the congregation of the dissenting Protestants of the town of *C.* The said indenture contained a proviso that if the heirs, executors, administrators, or assigns of the grantor should on any of the days named for payment of the said annuity pay unto *M. J.* and *J. B.*, or the survivor of them, or the executors, administrators, or assigns of the survivor, the sum of £300, in one payment, the said annuity should be no longer payable, but should determine. *Held*, that the said proviso was void as violating the rule against perpetuities. *In re Tyrrell’s Estate*, [1907] 1 I. R. 292, applied. *In re Earl of Denoughmore’s Estate*

[WYLIE, J., 211]

— **Fee-farm rent**—Covenant to fine down on payment of agreed number of years’

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— **Trust for accumulation—Charitable gift** 247

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**PETITION OF RIGHT**—Money under control of Lord Lieutenant *virtute officii* 83, 102  
See **DISTRICT LUNATIC ASYLUM.**

**PLEADING**—*Practice—Fraud—Evidence—Res inter alios acta—Frauds in other cases as evidence of a systematic course of dealing—Proof of similar frauds—Opening statement of counsel—Order XIX, Rule 6.*] An action was brought by a Life Assurance Company against the defendant, claiming to have a policy of assurance set aside on the ground of fraud. There was no averment in the statement of claim that the alleged fraud was part of a fraudulent system, nor any allegation that defendant had been a party to any similar acts of fraud. At the trial it was proposed, without previous notice to the defendant, to adduce evidence connected with the effecting of other policies by the defendant under similar fraudulent circumstances as evidence of a system of fraud. *Held*, that the evidence of the similar frauds would be admissible, if the substance of the allegation that the fraud was part of a system were stated in the statement of claim. *Edinburgh Life Assurance Co. v. Y.*

[BARTON, J., 306]

**PORTIONS**—*Marriage settlement—Portions for younger children—Children “other than an eldest or only son”—Younger daughter debarred from taking as a younger child—Elder daughter taking as a younger child.*] By a settlement executed in 1843 lands were conveyed to trustees to *L’E.* for life, with remainder to his sons in tail male, with remainder, in default of male issue, as to two of the lands, to his female issue as *L’E.* should appoint, and as to the other lands to certain other issue in tail male, with a power to *L’E.* to charge the lands with a sum of £3000 as a provision for the younger child or children of *L’E.* By a marriage settlement executed in 1850 on the marriage of *L’E.*, *L’E.*, in pursuance of said power, charged the said lands with the sum of £3000 in favour of the younger children of the intended marriage “other than an eldest or only son.” There were no sons of the marriage. *L’E.* by his will appointed the lands over which he had power of appointment to his younger daughter in fee-simple. *Held*, that the existence of a son was not required to bring into operation the provision of the charge for younger children; that the younger daughter, having taken the bulk of the lands under the limitations of the settlement, was debarred from taking under the provision for younger children, and that the elder daughter alone took under the said provision. *L’Estrange v. Winniett*

[ROSS, J., 62]



**PORTIONS**—*continued.*

2. — *Will—Construction—Person in loco parentis—“Younger children”—Eldest son—Eldership carrying the estate—Distribution—Period of—Class when ascertained—Infant—Maintenance—Contingent interest—Right to surplus income and accumulations.*] By his will a grandfather devised an estate to his son *W.* for life, with remainder to his first and other grandsons (the sons of *W.*), successively, in tail male, with remainder; if no grandson attained twenty-one, to testator's granddaughter or granddaughters, or such of them as should attain twenty-one or marry, and if more than one, in equal shares as tenants in common in tail, with cross-remainders. And testator charged the estate in favour of grandchildren in these terms:—“For the younger children of my said son *W.*, or such of them as shall attain twenty-one, or being daughters shall marry before that age, that is to say, for one younger child the sum of £3000, for two younger children the sum of £4000, equally between them, and for three or more younger children the sum of £5000 in equal proportions.” After the death of his grandfather and father, *T.*, the first-born grandson, became tenant in tail male in possession of the estate and died in 1910, under age and unmarried. There survived him one brother, who thereupon became the tenant in tail male in possession, and two sisters. None of them had attained twenty-one or married. The minors were wards of Court, and there was a sum of about £2300 in Court representing accumulations of interest on the portions-charge of £5000 provided by the will, which had been lodged by the receiver pursuant to order out of the rents and profits of the estate accruing since *T.* was in possession as tenant in tail male. *Held:* (1) That the accumulations of interest upon the younger children's portions-charge, after providing for maintenance, belonged to the administratrix of *T.* (2) That *T.* had not qualified to receive a younger child's portion, because he had died before the period of distribution, and had been in the character of “eldest son” in possession of the estate; and that consequently no larger sum than £4000 could ever be raisable for the purpose of the younger children's portions. The Court also declared that the sum presumptively raisable on foot of the portions-charge did not bear interest during the infancy and spinsterhood of the female minors, but only such annual allowance in lieu of interest as the Lord Chancellor might deem necessary for their reasonable maintenance. *Caldbeck v. Caldbeck* - BARTON, J., 144

— Satisfaction by legacy - - - 43  
See SATISFACTION.

**POSSESSION**—Delivery of, by mortgagor—  
Order LV., R. 7 - - - 33  
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**POWER**—*Will—Construction—“Relatives” of deceased person—Default of appointment—Tenant for life surviving donee of power—Time for ascertaining class.*] A widow by her will left her residuary estate in trust for her son *J.* for life, and after his decease in trust for his children, and in case of no such issue (which event happened) in trust to pay the income to her daughters *M.* and *B.* and her grandson *W.* for their lives in such shares as *J.* should appoint, and on their respective deaths the principal to be paid and transferred to such relatives of *J.*'s father, *S.* (the testatrix's late husband), as *J.* should by will appoint. *J.* died without making any appointment, and was survived by *W.*, who was the last surviving tenant for life. *Held*, that on the death of *W.* the persons entitled to the testatrix's residuary estate were the statutory next-of-kin of *S.* living at the death of *J.* *In re Swan deceased; Reid v. Swan*

[BARTON, J., 405; APP. 410]

**PRACTICE**—Costs—Administration action—  
Insolvent estate—Secured creditor—  
Realization of assets—Funds placed to  
separate credit—Priority - - - 312  
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— Costs—Taxation—Bankruptcy of client—  
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— Delivery of possession—By mortgagor—  
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— Estates Commissioners—Hearing owner of  
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— Injunction—Against trespass—Indorsement  
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— Land Commission—Death of vendor after  
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— Petition of right—Money under control of  
Lord Lieutenant *virtute officii* 83, 102  
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— Pleading—Systematic fraud - - - 306  
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**PRESUMPTION**—Purchase by agent at under-value—Lapse of time - - - 46  
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**PRICE**—Whether equitable—Land Act, 1903 ss. 3 (1), 5, 17—Insufficiency to redeem superior interest—Hearing owners of—Value of demesne land - - - 218, 227  
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**PRINCIPAL AND AGENT.**  
*See AGENT.*

**PRIORITY**—Costs—Administration of insolvent estate—Secured creditor—Funds placed to separate credit - - - 312  
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— Sale under Land Purchase Acts—Tithe rentcharge—Fee-farm rent - - - 317  
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**RECREATION**—For inhabitants of a particular town and district—Gift by will for—Directions ancillary to main purpose 247  
*See CHARITY. 2.*

**REDEMPTION**—Rentcharge—Unlimited period  
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— Reversion in Crown—Fee-farm grant—Liability of grantee - - - 431  
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— Superior interest—Insufficiency of purchase-money to satisfy—Jurisdiction of Estates Commissioners - - - 218, 227  
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— Superior interest—Tithe rentcharge—Fee-farm rent—Priority - - - 317  
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**RENT**—Fee-farm—Covenant to fine down on payment of agreed number of years' purchase - - - - - 205  
*See FEE-FARM GRANT. 1.*

— Fee-farm—Non-payment of—Extinction 271  
*See LIMITATIONS, STATUTE OF. 1.*

— Fee-farm—Tithe rentcharge—Sale under Land Purchase Acts—Priority - - - 317  
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— Judicial—Second term—Agreement fixing  
*See FAIR RENT. [243]*

— Redemption—Land Purchase Acts—Investment of purchase-money - - - 297  
*See SUPERIOR INTEREST. 2.*

**REVERSION IN THE CROWN**—Redemption—Fee-farm grant - - - 431  
*See SUPERIOR INTEREST. 3.*

**REVOCATION**—Will—Construction—Codicil—False assumption of fact—Inconsistent legacies.] The revocation of a bequest grounded on an assumption of fact which is false, takes effect, unless as a matter of construction the truth of the fact is the condition of the revocation. A testatrix by the first codicil to her will directed certain legacies, bequeathed thereby, to be paid out of "my V. bonds." By a second codicil she stated "I find I have a sum of £700 V. stock which I have not put into my will, and I wish to be disposed of as follows," and then proceeded to make a number of bequests of the "V. stock," which was shown to be the same as the "V. bonds" referred to in the former instrument. *Held*, that the bequest of "V. stock" in the second codicil being grounded on the false assumption that the testatrix had not made any previous disposition of the stock, and being contingent and conditional on the truth of that assumption, failed, and that the doctrine of revocation by inconsistent subsequent disposition did not apply. *In re Paris, deceased; Goddard v. Overend* (No. 2) M. R. 469

**ROYALTIES**—License to use patent—Assignment to bogus company - - - 236  
*See PATENT.*

**SATISFACTION**—Presumption—Person in loco parentis—Gift by deed—Subsequent will—Rule against double portions—Presumption of—Difference in gifts in value and certainty—Rebutting circumstances.] *G.*, by a voluntary deed, declared that he, his executors or administrators, or such other person or persons as he should by deed or will appoint trustee or trustees of the deed, should stand and be possessed of a sum of £6958 10s. 1d., secured by mortgage on the *D.* estate upon trust to receive the annual interest and income, and pay the net income to his sister *E.* for life or spinsterhood, with other limitations in the case of her death or marriage. The mortgage was a well-secured first mortgage, and the deed contained wide power of investment. *G.* received the interest and regularly paid it over to his sister. By a subsequent will he appointed trustees and executors and gave them all his real and personal property upon trust, *inter alia*, to pay to his sister *E.* the interest on £6500 for life or until she should marry. The powers of investment were restricted, and the subsequent limitations were different from those of the deed. It was provided by the will that if the testator's securities and investments should so depreciate that they were unable to pay to his sister *E.* £180 a year, she was only to receive £100 a year, the balance of the income of the £6500 to

**SATISFACTION**—*continued.*

be accumulated for the benefit of his sons. By a codicil he increased the gift to his sister *E.* by £400. *Held*, that assuming the testator had placed himself *in loco parentis* to his sister *E.*, and that there was a presumption of satisfaction, the presumption was rebutted by the difference in point of certainty and value between the obligations of the trust deed and the gift in the will. *In re Gleeson, deceased*; *Smyth v. Gleeson*

[BARTON, J., 113]

**SEPARATE CREDIT**—Administration action

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**SETTLED LAND ACTS**—Assignment of life estate by first tenant for life to second tenant for life

—Merger—Power of sale—Settled Land Act, 1882 (45 &amp; 46 Vict. c. 38), ss. 2, sub-s. 5, 3, 50, 51.]

Where the first tenant for life of settled lands has assigned his life estate to the second tenant for life under the settlement, so that the life estate of the former has become merged in that of the latter, the power of sale conferred on a tenant for life by the Settled Land Acts can be exercised by the second tenant for life, notwithstanding the provisions of sect. 50 of the Settled Land Act, 1882. Observations of Chitty, L.J., in *In re Mundy and Roper's Contract* [(1889) 1 Ch., at p. 296], and of Swinfen-Eady, J., in *In re Barlow's Contract* [(1903) 1 Ch., at p. 384], considered. *In re Bruen's Estate*

[WYLIE, J., 76]

2. — Lands settled subject to an annuity—Power of sale in trustees during life of tenant-for-life—Sale by tenant-for-life under the Land Purchase Acts carried through—Death of tenant-for-life after purchase-money advanced—Remainderman absolutely entitled—Continuing proceedings—Payment out of residue—Trustees for purposes of Settled Land Acts—Appointment of.] Lands settled subject only to an annuity (not secured by a term), were, in the events that happened, limited to *F.* for life, with remainder to *P.* absolutely. By the settlement, the trustees were given a power of sale during the life of *F.* *F.* sold the settled lands under the Land Purchase Acts, and died after the purchase-money had been advanced. The final schedule had been settled on the assumption that the residue would be paid to the trustees of the settlement. The annuitant objected, claiming to be put on the final schedule on the ground that the settlement was at an end. *Held* (1) that, as a matter of form, an order should be made continuing the proceedings in the name of *P.*; and (2) that the moneys in Court being capital moneys arising from the sale of the settled lands, which had been carried through by the tenant-for-life under the Settled Land Acts, the Court had

**SETTLED LAND ACTS**—*continued.*

power to appoint trustees for the purposes of the Settled Land Acts, and to pay the residue to them to be held upon the trusts of the settlement. *Semble*, on the death of *F.*, the trustees of the settlement ceased to be trustees for the purposes of the Settled Land Acts. *In re Mundy and Roper's Contract* [(1889) 1 Ch. D. 275] and *In re Wimborne and Brown's Contract* [(1904) 1 Ch. D. 537] distinguished. *In re Colles's Estate* WYLIE, J., 267

**SETTLEMENT**—Equitable estate pur autre vie

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—Portions—Younger child - - - 62, 144

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**SUMMONS**—Payment out of Court - 434  
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**SUPERIOR INTEREST** — *Estates Commissioners—Jurisdiction—Price—Demesne land—Irish Land Act, 1903, sections 3 (1), 5, 17.* Where a vendor has given *prima facie* evidence of title under section 17 of the Irish Land Act, 1903, the Estates Commissioners have jurisdiction to deal with him as owner for the purpose of effecting a

**SUPERIOR INTEREST**—*continued.*

sale, without inquiry as to the amount of redemption prices of superior interests, and as to the sufficiency of the purchase-money to satisfy and redeem such superior interests in full. There is no distinction in this respect between the jurisdiction of the Commissioners in the purchase of demesne land under section 3 (1) of the Irish Land Act, 1903, and of any other land which, under that statute, they have power to acquire. The Commissioners in exercising this jurisdiction are the sole judges of what price represents the selling value of such demesne land, and of whether, having regard to all the circumstances of the case, the agreed price is equitable. Upon these questions the owner of a superior interest may properly be heard before the Commissioners, and if the superior interest affects only part of the demesne land sold, it may be proper to determine separately the selling value of that part. But the Commissioners have jurisdiction to proceed with the sale although the purchase-money may eventually prove insufficient to redeem a superior interest at the price fixed by the Judicial Commissioner. In such last-mentioned contingency, *semble, per Cherry, L.J.*, any collateral security such as a covenant to pay a head-rent would not be affected. *In re Borrowes's Estate*, WYLLIE, J., 218; APP. 227

2. — *Land Purchase Acts—Head-rent—Redemption price*—"Settled land"—"Land purchased by means of an advance"—*Investment—Public trustee—Irish Land Act, 1909 (9 Edw. 7, c. 42), s. 38, sub-s. 1 (a).* Head-rents, the subject-matter of a settlement, when redeemed under the Land Purchase Acts are "land purchased by means of an advance," and the redemption-money of same may be invested by the trustees of the settlement with the sanction of the public trustee in the extended class of investments authorized by section 38, sub-s. 1 (a), of the Irish Land Act, 1909. *In re Bandon Estates* - - - BARTON, J., 297

3. — *Land Purchase Acts—Reversion of the Crown—Redemption price of—By whom payable.* Lands were granted by Letters Patent to the ancestor of the Marquis of Ormonde, leaving a reversion in the Crown. By certain private Acts of Parliament the successors in the title of the patentees were empowered to make leases for lives renewable for ever, and fee-farm grants subject to reversion to the Crown. Portion of the lands was subsequently conveyed by fee-farm grant made pursuant to the provisions of the Renewable Leasehold Conversion Act. On a sale by the fee-farm grantee to the tenants under the Land Act, 1903:—*Held*, that the redemption price of the Crown reversion should be paid by the vendor, the fee-farm grantee, out of the purchase-money of the estate, and not by the fee-farm grantor. *In re Tighe's Estate* - - - ROSS, J., 431



**SUPERIOR INTEREST**—*continued.*

- Tithe rentcharge—Fee-farm rent—Priority  
*See* **TITHE RENTCHARGE.** [317]

**SYSTEMATIC FRAUD**—Evidence—Pleading  
*See* **PLEADING.** [306]

**TAXATION OF COSTS**—*Practice—Bankruptcy of client—Undertaking by solicitor not to prove.*  
 When a client who has obtained an order to tax his solicitor's bill of costs becomes bankrupt, his assignees, if the solicitor undertakes not to prove in the bankruptcy for the costs, cannot continue the taxation without giving an undertaking to pay the taxed amount of the bill. *In re Merrick; Ex parte Joyce* - - - **APP.** 279

**TENANT FOR LIFE AND REMAINDERMAN**—Conveyance of life estate, by first tenant for life to second - - 76  
*See* **SETTLED LAND ACTS.** 1.  
 — Sale by tenant for life—Remainderman absolutely entitled—Appointment of trustees for purposes of Settled Land Acts  
*See* **SETTLED LAND ACTS.** 2. [267]

**TIME**—For ascertaining class—Testamentary power - - - 405, 410  
*See* **POWER.**  
 — For declaration of purchase in trust—Land Law Acts - - - 444, 447  
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**TITHE RENTCHARGE**—*Land Purchase Acts—Lands sold held under fee-farm grant—Tithe rentcharge payable by fee-farm grantee—Purchase-money insufficient to redeem fee-farm rent and tithe-rent charge—Priority—1 & 2 Vict. c. 109, s. 9.*  
 Where lands held under a fee-farm grant, and subject to tithe rentcharge payable by the fee-farm grantee, as owner of the first estate of inheritance or equivalent estate within the meaning of the Tithe Rentcharge Act, 1838, are sold by the fee-farm grantee under the Land Purchase Acts, the claim in respect of the fee-farm rent is entitled to be placed on the final schedule for payment in priority to that in respect of the tithe rentcharge. *Irish Land Commission v. Annesley* ([1903] 1 Ir. R. 429; [1904] 1 Ir. R. 272) applied. *In re Moss's Estate* - - - **WYLIE, J.**, 317

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**TRUSTEE**—*Land Law (Ireland) Acts—51 & 52 Vict. c. 49, s. 2; 59 & 60 Vict. c. 47, s. 30—Limit on advances—Purchase in trust—Husband and wife purchasers—Subsequent purchase by husband alone—Purchases on different estates—Declaration of trust—To whom and at what time to be made.* A purchaser in trust for another is

**TRUSTEE**—*continued.*

not entitled to the benefit of section 30 of the Land Law (Ireland) Act, 1896, unless he declares the trust to the Land Commission before the advance to him as trustee is made. Where a husband and wife obtained an advance for the purchase of a holding, and the husband alone afterwards applied for an advance for the purchase of a holding on another estate: *Held*, that, in computing the amount which might be advanced on the husband's application, the prior advance to him and his wife could not be excluded. *In re Lyons's Estate*

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